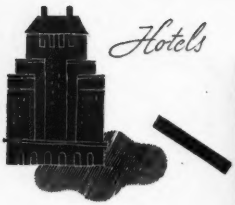
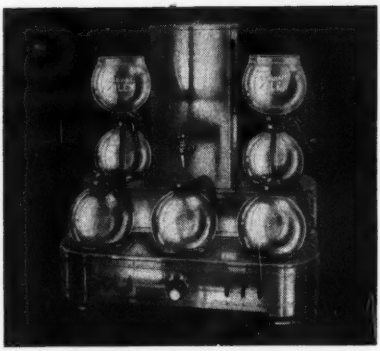
Public Utilities

FORTNIGHTLY

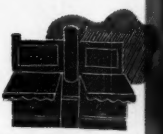
December 22, 1938

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS





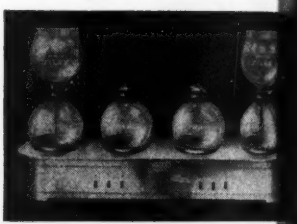
Carlton 4-unit Electric Model with built-in hot water tank. Brewing capacity, 12 to 240 cups per hour. Ideal unit for hotels and large restaurants. Will add 31 KWH to your lines daily, based on 14-hour use period. $173.95.



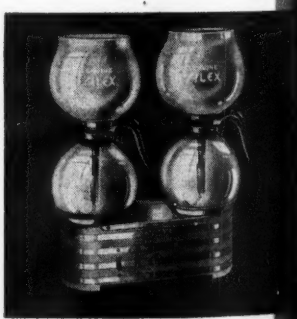
Extra LOAD *without* Extra WORK

Practically every hotel, restaurant, drug store and institution in your community is a ready prospect for Silex Glass Coffee Makers. And every Silex Commercial Unit installed on your lines is a source of volume load revenue that you can't afford to overlook! In many instances, Silex Commercial Coffee Maker installations are in operation 24 hours—every day. But estimated on a 14-hour use period each 4-unit Carlton Tank Model, for example, will add 31 KWH to your daily load.

Silex Commercial Coffee Makers are easy to sell, because Silex brewed coffee is always in demand. Your job is more than half done the moment you suggest the Silex. For more information write



ROYAL 4-unit Electric Model with stai... steel range body. Brewing capacity 12 t... cups per hour. A medium size unit for ... fountains and restaurants. Adds 17 KWH ... to your lines, based on 14-hour use pe... $46.95.



TRAYMORE 2-unit Electric Model with ... less steel range body. Brews 12 to 60 cup... hour. Adds 9 KWH daily to your load, ... on 14-hour use period. The right size for l... cenettes and soda fountains. $21.49.

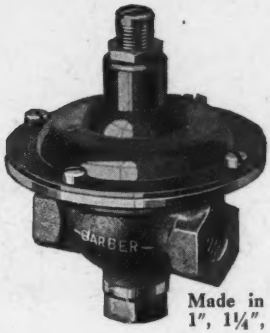
Other Electric or gas models, 2- to 8-unit sizes from $15.95 to $228.45.

THE SILEX COMPANY, DEPT. P-12, HARTFORD, CONN.

Creators of the Glass Coffee Maker Industry

Genuine SILEX GLASS COFFEE MAKER

TRADE MARK REGISTERED U.S. PAT. OFF.



Made in ¼", ⅜", ½", ¾", 1", 1¼", 1½", and 2" sizes.

BARBER Gas Pressure Regulators

—Better Styled—Better Made

THE necessity for the use of reliable gas pressure regulators on kitchen ranges, as well as other home and commercial gas appliances, is now widely recognized. Regulators are essential to flame control, safety, and fuel economy. The eye-appeal of Barber Regulators will be found wholly in keeping with up-to-date styling of today's ranges. In fact the attractive appearance of Barber Regulators, harmonizing with modern design in most types of heating equipment, has induced many appliance builders to include them as standard equipment.

Barber Gas Pressure Regulators are built in accordance with high standards of precision, and operate within a range of 3/10 pressure drop. Neat, compact, all-bronze body, brass working parts. Size ¼" to 1½" tested and certified by A.G.A. Testing Laboratory. For appliances which you sell, sponsor, or manufacture, the use of Barber Regulators is an additional evidence of Quality.

Write for complete Barber Catalog on Burner Units for Gas Appliances, Conversion Burners for Furnaces and Boilers, and Pressure Regulators.

THE BARBER GAS BURNER CO., 3704 Superior Avenue, Cleveland, Ohio

BARBER *Automatic* JET GAS BURNERS

For Warm Air Furnaces, Steam and Hot Water Boilers and Other Appliances

Editor—HENRY C. SPURR
Associate Editors—ELLSWORTH NICHOLS, FRANCIS X. WELCH, NEIL H. DUFFY
Contributing Editor—OWEN ELY

Public Utilities Fortnightly

VOLUME XXII *December 22, 1938* NUMBER 13

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

Publication Office ..... CANDLER BUILDING, BALTIMORE, MD.
Executive, Editorial, and Advertising Offices ..... MUNSEY BUILDING, WASHINGTON, D. C.

PUBLIC UTILITIES FORTNIGHTLY, a magazine dealing with the problems of utility regulation and allied topics, including also decisions of the regulatory commissions and courts, preprinted from *Public Utilities Reports, New Series*, such Reports being supported in part by those conducting public utility service, manufacturers, bankers, accountants, and other users. Entered as second-class matter April 29, 1915, under the Act of March 3, 1879. Entered at the Post Office at Baltimore, Md., Dec. 31, 1936; copyrighted, 1938, by Public Utilities Reports, Inc. Printed in U. S. A.

PRICE, 75 CENTS A COPY ANNUAL SUBSCRIPTION, $15.00

Pages with the Editors

HERE again is Christmas and once more the season of "peace on earth, good will to men." Occasionally we have observed that passage from St. Luke's Gospel translated as "peace on earth to men of good will"—a version which, in view of the present state of affairs on Mother Earth, would seem to be more judicious if somewhat overcautious.

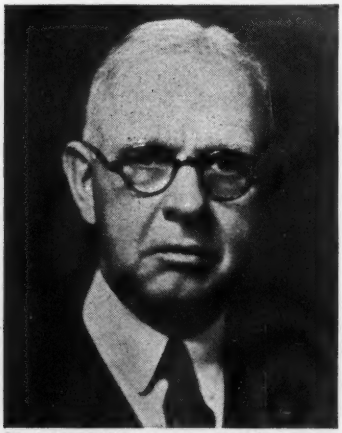
AND this limitation of peaceful admonition need not be confined entirely to the troubled realm of foreign affairs. The gentle dove is going to have a jittery time of it even at home. Unless all signs fail and all political prophets err, we are going to hear a great deal about rearmament and the national defense during the forthcoming year of 1939.

POLITICAL analysts have an interesting time reviewing the various stages in the evolution of the New Deal. Arthur Krock of *The New York Times* recently pointed out that for the first hundred days of its existence in 1933, the New Deal emphasis was on economy and retrenchment. Since then it has been more or less in the opposite direction—on spending. During the last two years we heard a great deal about planning and the need for correlated conservation of rivers, forests, natural resources, and the control of floods, erosion, navigation, and so forth. But next year, it is said, national defense will be the leading theme.

GEORGE E. DOYING

How far has public ownership progressed under the New Deal?

(SEE PAGE 803)



Blackstone Studios

LUTHER R. NASH

There is an irreducible cellar for utility rates.

(SEE PAGE 810)

INDEED, even the ladies' fashions seem to have taken the Washington cue. From a recent issue of our esteemed contemporary, the *Ladies Home Journal*, we were interested to note that the new winter styles have a prominent military motif, with rows of shiny buttons, belted tunics, and even wonderously wrought hats which have the appearance of "bombs bursting in air."

IT is in such an atmosphere of seeming anxiety over national security that we must perforce celebrate the birthday of the Prince of Peace. But be that as it may, the old-fashioned spirit of the yuletide still thrives in America. And we gladly join in crying out a hearty "Merry Christmas" to all our friends and subscribers.

SPEAKING about the anticipated emphasis by the administration on national defense during the next year, brings to mind the complaint of some utility men to the general effect that

no matter what particular phase this administration happens to be passing through, or what the nature of the passing "emphasis" happens to be, it always seems to include some new problem for the private utility industries.

THAT may strike some as an exaggeration, but it is true that during the "economy" period of the New Deal in 1933, special taxes on the utilities were advanced. When economy went out of fashion and Federal spending to relieve unemployment came into style, the PWA managed to lay out quite a tidy sum for municipalities to build their own utility plants—the only type of public works construction which operated directly to the detriment of private investment. And, of course, we all know now that we have the government activity in the Tennessee valley because of the constitutional duty of Congress to improve navigation and control floods in the Tennessee watershed. There are other Federal projects which fall under a general heading of a planned conservation of our national heritage.

So it is probably a fair question to consider whether there are any more surprises for the utilities in the latest Christmas package which the New Deal Santa Claus is wrapping up for the new session of Congress. This line of thought would eventually bring up speculation as to whether the St. Lawrence seaway-power project will make a return visit to Washington, stripped of its time-worn arguments based on improving inland navigation, and all diked out in the latest patriotic colors of national defense.

TIME alone will tell! But we thought the chance good enough to bring forth another analytical discussion (beginning page 818) of the St. Lawrence proposal by an author who finds much favor with FORTNIGHTLY readers—FERGUS J. MCDIARMID. We hardly need remind you that as an erstwhile Canadian (graduated from the University of Toronto in 1928) MR. MCDIARMID knows what he is talking about when he crosses the northern boundary for a subject. The author is also well known as a life insurance actuarial expert and is presently associated with the Lincoln National Life Insurance Company.

FERGUS J. MCDIARMID

—a fresh water boundary and a seagoing President.

(SEE PAGE 818)

THE reference to the PWA reminds us that, according to its boss, Secretary of Interior Ickes, PWA has just about cleaned up its current pocketbook and there are predictions that the new Congress may not be quite so liberal in renewing the same set-up with another instalment of Treasury funds. The lawmakers will probably spend just as much money next year as they did last (lawmakers generally do), but there are rumors that the 76th Congress will insist on keeping a few strings to the purse under its own control. If that should develop, we may not see PWA in exactly the same business at exactly the same old stand. We thought this would be a good time, therefore, to check up on just what PWA has done to date by way of financing publicly owned utility properties. Our article in this issue (page 803) by GEORGE E. DOYING, managing editor of *P. U. R. Executive Information Service,* is presentation along this line.

MOST of us have heard the old gag about the merchant who explained that he was able to carry on a continuous "below-cost" sale because of the volume of trade it encouraged. There is probably more real basis for the popular belief that cutting electric rates is frequently offset over a reasonable period by increased consumption and often results in an actual increase in net revenues for the utility. We all know of instances where such was, in truth, the effect of a rate reduction. But common sense tells us that it couldn't possibly turn out that way under all circumstances. Since, therefore, rates cannot be reduced nor consumption increased *ad infinitum,* where is the economic boundary line? What are the rules and standards which control its operations? Such is the interesting subject to which that well-known utility economist, LUTHER R. NASH, addresses himself in this issue (page 810). MR. NASH is now engaged as consulting engineer for the Stone & Webster organization.

THE next number of this magazine will be out January 5th.

The Editors

In This Issue

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 441–504, from P.U.R.(N.S.)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

C. M. TURNER
Assistant to Vice President, Ebasco Services, Inc.

"The desire to 'live electrically' is being instilled in the minds of Mr. and Mrs. America."

SAMUEL O. DUNN
Editor, Railway Age.

"Only the government, with its ability to pay losses from taxes, can long operate a great industry at a loss."

HAROLD L. ICKES
Secretary of the Interior.

"If in doubt what candidates to vote for, find out whom the utility interests are supporting; then vote against that candidate."

JAMES RORTY
Writing in The Nation.

"It is scarcely too much to say that the future of civilization will be determined to a considerable degree by who rules radio and how."

BRUNO RAHN
President, Wisconsin Utilities Association.

"The truth is the electric industry pioneered the development of rural electrification long before any government bureau ever dreamed of the subject."

C. J. STRIKE
President, Idaho Power Company.

"If we are to take the electric light and power issue out of politics then we must understand the tactics of politicians. We must refrain from striking back at them, and instead take the power question off main street in every community we serve by proving to the public that we have done an acceptable job."

J. HOWARD PEW
President, Sun Oil Company.

". . . when the arm of the government is thrust into the intimate workings of business, when government undertakes to dictate policy, to fix prices, to interfere with the very competition which it assumes to be protecting, then we have government control; and that is inevitably paralyzing to initiative, invention, adventure, and enterprise."

BASIL MANLY
Member, Federal Power Commission.

"It seems to me highly desirable that ultimately all agencies in this field [of electric power], whether privately owned or operated by the Federal, state, or local governments, should adopt this uniform system of accounts [prescribed by the FPC] so that the records of their activities and the results of their operations would be strictly comparable."

ALEXANDER SHAPIRO
Director of Personnel, Capital Transit Company.

"A personnel department is really a form of purchasing organization, specializing in the purchase of human efficiency in the performance of a given task."

JOSEPH C. O'MAHONEY
U. S. Senator from Wyoming.

"The general failure to recognize the distinction between natural persons and corporations has probably been the principal cause of our economic distress."

JOHN C. PAGE
Commissioner, Bureau of Reclamation.

"It is time that something be done to forestall sporadic general moratoria on construction charges, or the Federal reclamation policy may be permanently weakened."

GEORGE SCOTT
Writing in New Masses.

"As the result of the European crisis, newspapers have found themselves reduced to mere printed footnotes to broadcasts and are likely to remain so in future emergencies."

EDITORIAL STATEMENT
Broadcasting.

"We wonder, as do others in radio, whether the new million-dollar newspaper advertising campaign of the movies is the forerunner of an antiradio publisher-motion picture producer 'axis.'"

HOWARD BRUBAKER
Writing in The New Yorker.

"In one of our public schools, the pupils are operating a model railway system. The experiment proves that all railways could be run successfully if the hands would work for nothing a week."

GEORGE D. AIKEN
Governor of Vermont.

"Unless we have interstate compacts as the solution for problems in which several states have an interest, the only alternative to doing nothing is to increase the authority of the central government."

CHARLES W. CHASE
Former President, American Transit Association.

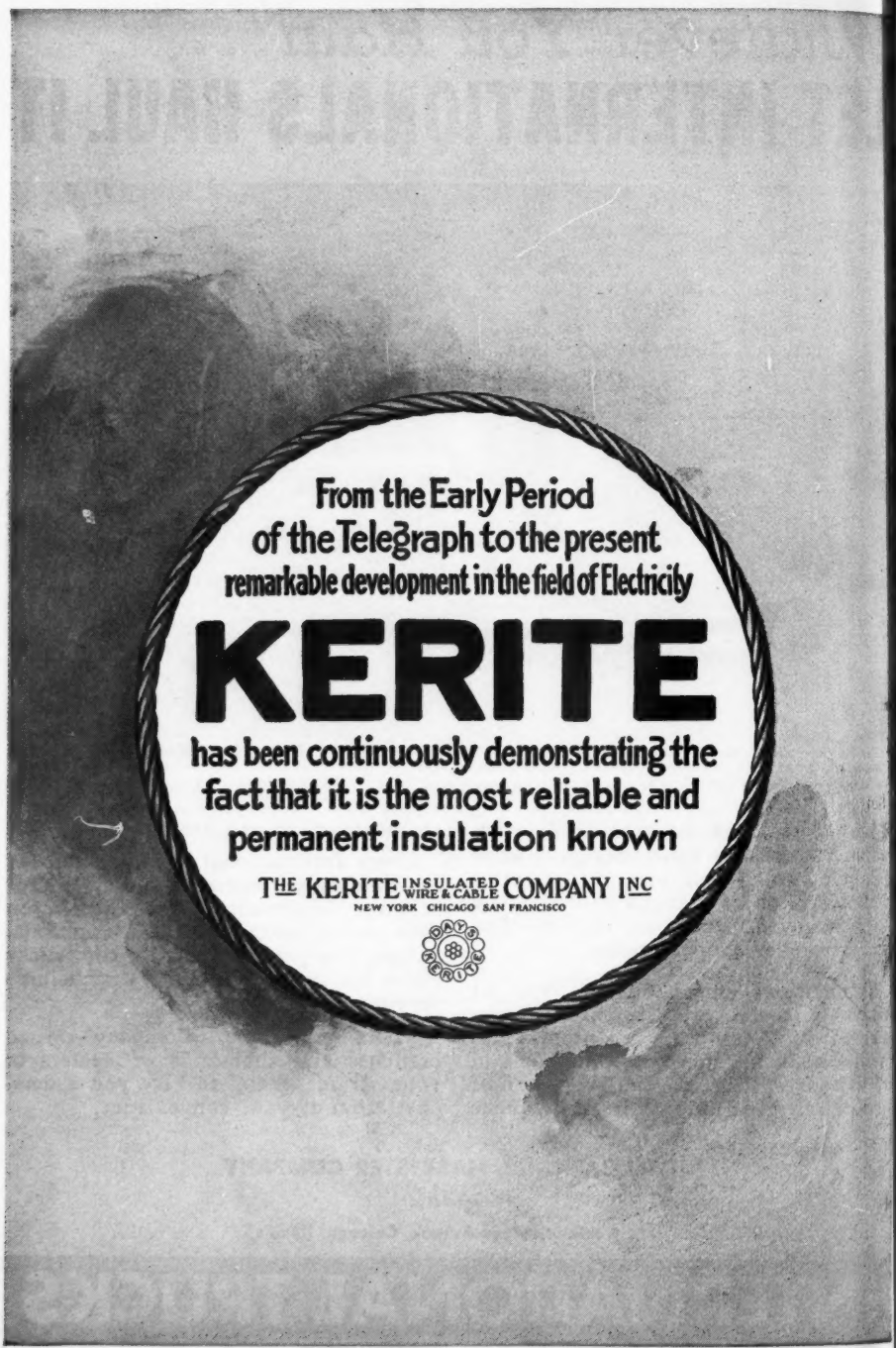
"We cannot hope to sell our [transit] service in this fast moving world and generation, with its rapidly changing habits of life, unless we can continuously offer to our patrons the service that they demand and deserve."

JAMES R. GARFIELD
Former Secretary of the Interior.

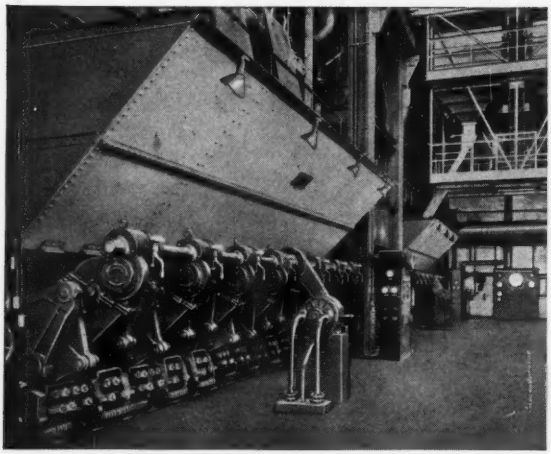
"We all recognize that regulation of public utilities is necessary. But there is a vast difference between wise regulation and the imposing of arbitrary, destructive decisions by public officials not skilled in the business they are trying to control."

THOMAS S. HOLDEN
Vice President, F. W. Dodge Corporation.

"While we can visualize potential increases in industrial, domestic, and rural electrification, I believe that expansion of the electric utilities is to be expected in large part as a result of supplying more and more power at progressively lower costs."



What Do They *Say* about TODAY'S TAYLOR STOKER?



"They are appealing to us because of their compactness, ruggedness, flexibility, minimum stack discharge, quick response to load demand, and efficiency."

"From all present indications, we believe that these two stokers are capable of continuing to reliably and economically serve us for many years to come."

"...our experience with Taylor Stokers has been most satisfactory."

"Our experience, thus far, and tests conducted on various coals have convinced us of their fuel flexibility, and because of this feature alone we have already realized very attractive savings in fuel costs."

"Due to the nature of our business the load is variable and the stokers have demonstrated their ability to take the swings in the load very well indeed."

"The availability factor has been very high."

AN expression of basic satisfaction runs through all of these statements from users of today's Taylor Stokers. Essentially it is just this type of over-all satisfaction that is responsible for the increasing number of Taylor Stoker installations in prominent industries, institutions, and municipalities throughout the world. Today's Taylor Stoker is the result of many years of constant research and development on the part of A-E-CO engineers. It is well worth your careful investigation. Call in one of A-E-CO's representatives and get the FACTS!

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A-E-CO PRODUCTS: Taylor Stokers, Water Cooled Furnaces, Ash Hoppers, Lo-Hed Hoists, Marine Deck Auxiliaries, Hele-Shaw Fluid Power.

AMERICAN ENGINEERING COMPANY

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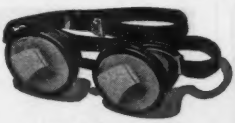
Welding Goggles

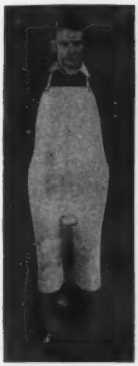


Chipping Goggles

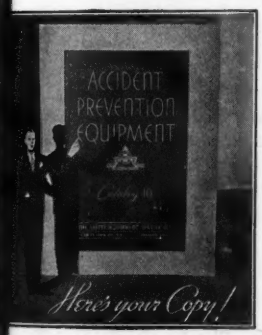
"SAFETY-SERVICE"

A Quality Line of

Accident-Prevention Equipment for Every Industrial Need!



The "SAFETY-SERVICE" line is noted for "High Quality" and is a complete line of safety equipment necessary to safeguard your workmen against any and all sorts of industrial hazards—protection from head to foot, such as Goggles, Welding Glass, Helmets, Hoods, Gas Masks, Respirators, Protective Hand Cream, Lineman's Rubber Gloves and Blankets, Floor Mats, Ladder Shoes, Wool Suits, also Gloves, Mittens, Sleevelets, Coats, Pants, one-piece Suits, Leggings and Aprons made of either Asbestos, Leather or Fire-Resisting materials, and a large number of mechanical devices, machine guards, signs, etc.



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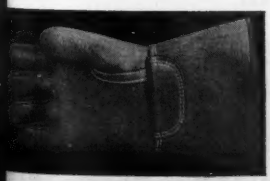
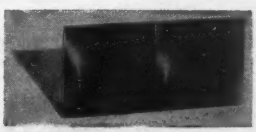
THE SAFETY EQUIPMENT SERVICE CO.

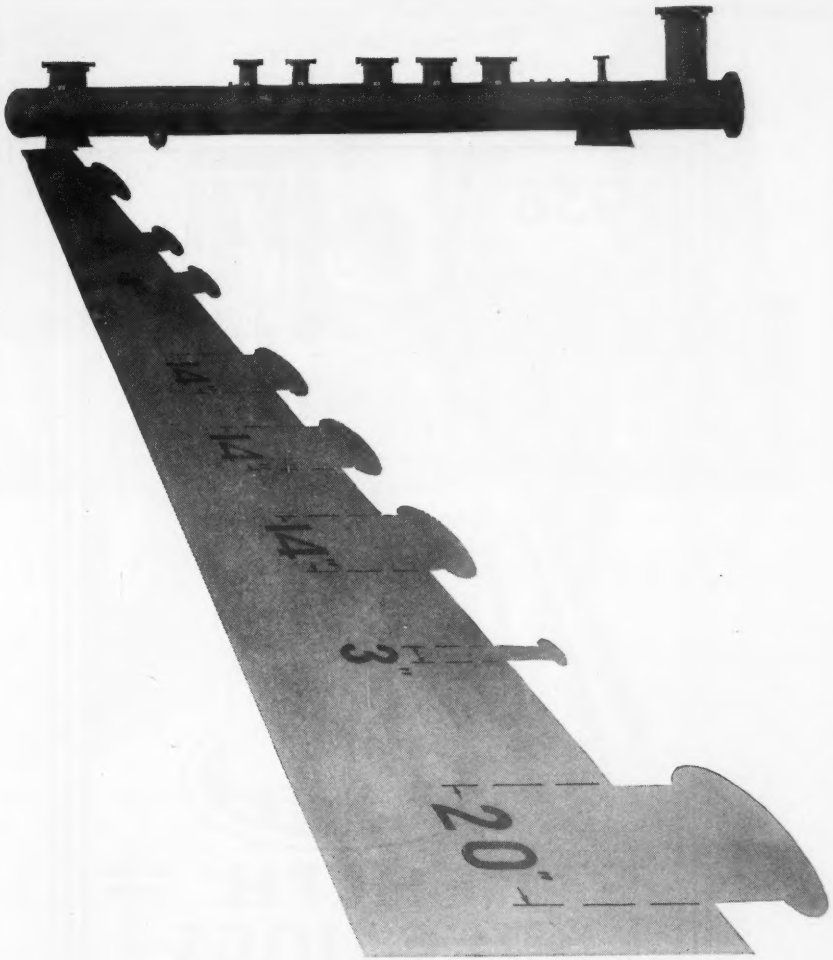
Buell W. Nutt, President

1230 St. Clair Ave., CLEVELAND, OHIO





Welding Glass



READING from left to right, those are the inch diameters of the Grinnell-extruded outlets provided on this single prefabricated unit — a high-pressure, high-temperature header for a large power company installation. Thirty feet long, with walls ⅝" thick and lap joint flanges, it is a good example of the carefully engineered sub-assemblies which are solving problems for engineers who say, "Give the plans to Grinnell." Grinnell Company, Inc., Executive Offices, Providence, R. I. Branch offices in principal cities of U. S. and Canada.

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FOR LENGTH OF SERVICE and turbine hours per gallon of "make-up," no turbine oils measure up to Gargoyle D.T.E. Oil Light. That is why more than half the country's turbines rated 5000 kw. and over use them exclusively. This wealth of turbine operating experience Socony-Vacuum places at the disposal of your men.

Socony-Vacuum has "kept cases" on turbine operation. This experience is made available without cost to turbine men. Pamphlets prepared on this subject will be sent at your request. In addition, see the new movie called "The Inside Story," which reveals exactly what Correct Lubrication does. Just write to the nearest Socony-Vacuum office for these aids.

"72 Years of Experience Calling"

That is what the chief of a great utility wrote to one of his station superintendents. For when the Socony-Vacuum Representative calls on you, he brings to your problems the greatest experience in the oil business. Many operators find this experience helps them to chalk up records for efficiency and economy. Why not make sure to see if our man has something you can turn to your advantage?

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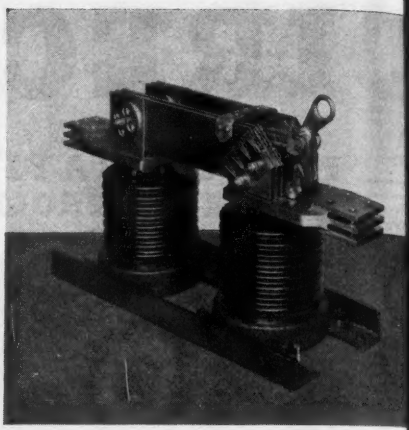
GARGOYLE Lubricants

MAKERS OF MOBILGAS, MOBILOIL, GARGOYLE INDUSTRIAL LUBRICANTS



Merry Christmas

and

A Happy New Year

1938-1939

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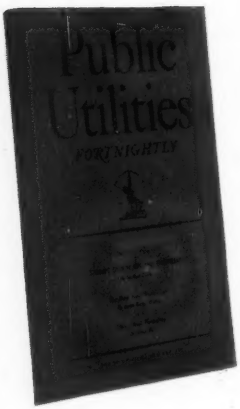

THE review magazine of current opinion and news relating to public utilities. Conducted as an open forum for the frank discussion of both sides of controversial questions—economic, legal, and financial; also gives trends in the present-day control of these companies—governmental competition—state and Federal regulation.

¶ Issued every other Thursday—26 numbers a year—annual subscription $15.00.

¶ The only magazine furnishing current and vital information on all subjects involving the financing, operation, and management of public utilities under governmental regulation and competition.

¶ **A Christmas Gift** of unusual value and current stimulation to all persons holding positions with, or having a financial interest in, public utilities. A remembrance that will constitute a fortnightly reminder of your esteem and thoughtfulness throughout the year 1939.

Christmas Order Form

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1038 Munsey Building, Washington, D. C.

Please forward, prepaid, to the following, Public Utilities Fortnightly (26 issues), at $15.00, beginning January, 1939.

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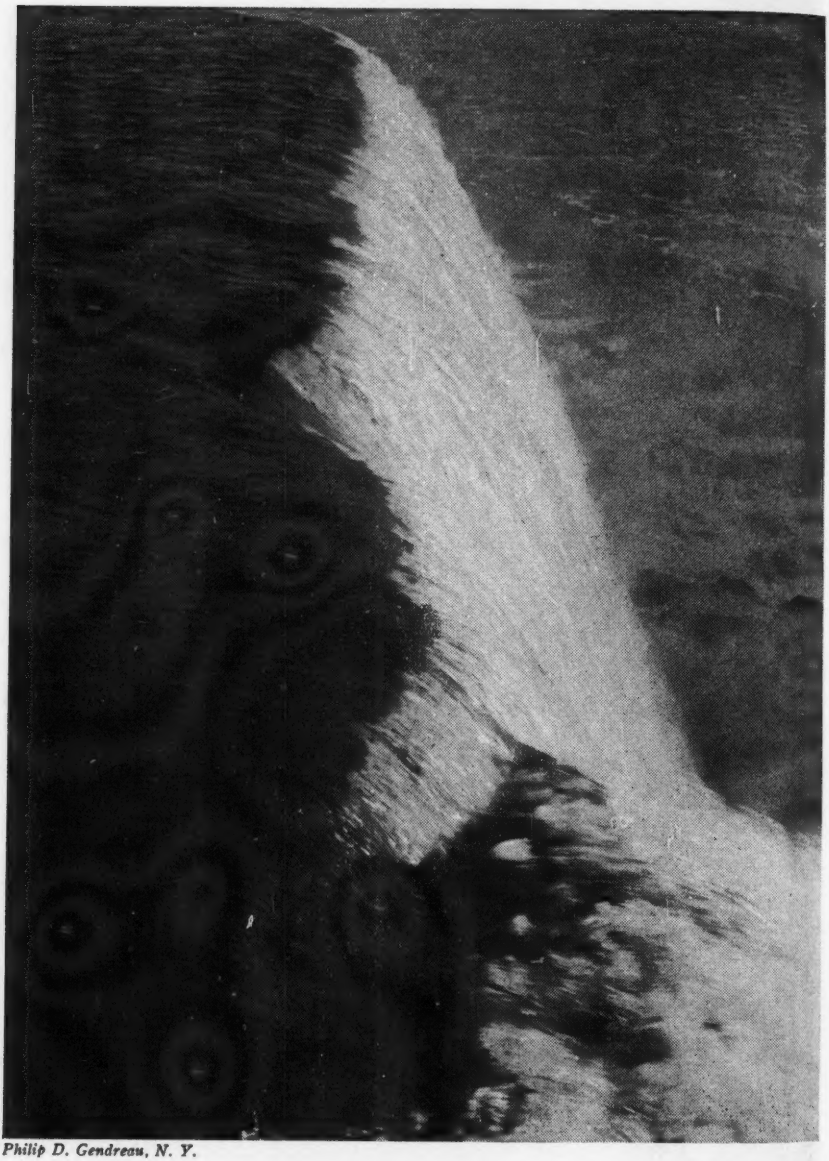
Utilities Almanack

DECEMBER

22	Th	¶ *American Bar Association, House of Delegates, will hold meeting, Chicago, Ill., January 9, 10, 1939.*
23	F	¶ *Canadian Construction Association will hold annual convention, Winnipeg, Man., January 10–12, 1939.*
24	Sa	¶ *American Engineering Council will hold annual assembly and third forum, Washington, D. C., January 12–14, 1939.*
25	S	¶ *Merry Christmas, 1938!*
26	M	¶ *American Society of Civil Engineers will hold annual meeting, New York, N. Y., January 18–20, 1939.*
27	Tu	¶ *American Association for the Advancement of Science convenes for winter meeting, Richmond, Va., 1938.*
28	W	¶ *Tax Policy League opens session, Detroit, Mich., 1938.*
29	Th	¶ *American Water Works Association, New York Section, opens convention, New York, N. Y., 1938.*
30	F	¶ *American Society of Heating and Ventilating Engineers will hold annual meeting, Pittsburgh, Pa., January 23–26, 1939.*
31	Sa	¶ *National Electrical Manufacturers Association will hold mid-winter conference, New York, N. Y., February 5–11, 1939.*

JANUARY

1	S	¶ *Happy New Year, 1939!*
2	M	¶ *New England Gas Association will hold annual business conference, Boston, Mass., February 16, 17, 1939.*
3	Tu	¶ *Southern Gas Association will hold annual convention, S. S. Rotterdam, New Orleans to Havana and return, March 19–23, 1939.*
4	W	¶ *American Water Works Association, Canadian Section, will hold meeting, Toronto, Ont., April 12–14, 1939.*



Philip D. Gendreau, N. Y.

A Close-up of Niagara

Public Utilities

FORTNIGHTLY

VOL. XXII; No. 13 DECEMBER 22, 1938

Public Ownership on the March

Strategy of its crusaders, likened by the author to that of the W. C. T. U. and the Prohibition party, which ended in the adoption of the Eighteenth Amendment to the Constitution. Can the privately owned electric utilities avoid a similar pitfall?

BY GEORGE E. DOYING

THEY laughed at the W. C. T. U. and the Prohibition Party for many years—"they" being those astute individuals who could not imagine that one day the plodding persistence of the little bands of crusaders would be rewarded. The awakening came when intoxicating liquors were banned throughout the United States.

Like the crash of doom, glittering "dens of iniquity" for the dispensing of alcoholic beverages were forced to close, even in the great cities where saloons and liquor were generally accepted as a part of life's necessities. Millions of dollars of investments in distilleries, breweries, and barrooms, vanished almost overnight.

Now, there is a certain analogy between the present position of the privately owned electric utilities with that occupied by the liquor industry some thirty or forty years ago, although it is not, of course, urged that the use of electricity be abolished.

The wearers of the white ribbon, symbol of the prohibitionists, reached the summit of their ambition, then fell from grace when the fallacy of their program had been demonstrated. But at what cost!

Their counterparts in strategy are the advocates of public ownership, who for years have been plugging away to advance their cause. Their activities, like those of the prohibitionists in the

early days, have been most effective in the smaller communities, and throughout the years they have had their ups and downs.

Many a small-town alderman attained office on a "local option" platform back in the days when prohibition was a live local issue. As the "dry" movement gained momentum, candidates professing allegiance to the cause were elected to higher offices, and in time the white ribbon appeared in the halls of Congress. In numerous instances shrewd politicians adroitly turned the issue to their own advantage by proclaiming adherence to policies they never expected to prevail.

Here the analogy to the case of the utilities is as clear as crystal. The 75th Congress included a substantial number of followers of the "holy grail" of public ownership. Many other analogous situations can be seen by those who remember the turmoil over saloons around the turn of the century.

WITHOUT laboring the point, let it be noted that when the country was virtually stampeded into adoption of the Eighteenth Amendment, the white ribbon victory was due in large measure to a half century of spade work.

The same general type of spade work has been carried on by the public ownership advocates. In addition, during the last five years they have had at their disposal a steam shovel supplied by the New Deal.

When, last September, President Roosevelt became economy-minded and announced the discontinuance of loans and grants by the Public Works Administration to local public agencies, it was widely believed that there would be no more Federal financing of municipal and district power plants. That belief sustained a rude shock when the President proposed to resume the lending-spending program.

Not only was the PWA to be authorized to supply funds for local projects. It was also to become the "angel" for communities which were financially unable to furnish collateral even for a loan of 55 per cent of a project's cost. The plan was that the PWA would build the project and lease it to the municipality, with or without privilege to purchase, a subtle scheme to enable cities and villages to evade their constitutional debt limitations—and to ease the path of public ownership.

A TREMENDOUS—and significant—uproar greeted a proposal by the Senate Appropriations Committee to restrict the use of PWA funds for the construction of competitive utilities. President Roosevelt found it advisable to announce, through Senator Barkley, that duplication would not be authorized except when a utility refused a "fair price" for its property. The joker here is that the President, or his Public Works Administrator, Secretary Ickes—both of whom have indicated rather definite antagonism toward privately owned utilities—will be sole judge of the fairness of any offer made by a municipality.

It is noteworthy that the PWA had on hand some fifty approved applications for municipal electric projects which, if constructed, would compete with existing privately owned facilities. In a large majority of these cases the municipalities have given no indication that they are willing to buy instead of build.

Explaining to the Senate the position of the subcommittee which initiated the restricting amendment (later rejected by the Senate), Senator Adams of Colorado, subcommittee chairman, said:

> It was not the intention of the committee in any way to interfere with the public ownership or public construction of public utilities. We thought that a grant of public money ought not to be made to destroy an existing utility within a city, when that utility was giving adequate service at fair rates. . . . I think that perhaps every member of the committee believes in the government ownership of the public utilities which affect cities.

An incipient filibuster in the Senate against the flood control bill, during the closing days of the last session, was viewed in some quarters as a protest against Federal power development. Such a view, however, was erroneous. It was a protest against further invasion of states' rights.

Senator O'Mahoney of Wyoming was one of the leaders in this fight against the administration's program. But Senator O'Mahoney made his position perfectly clear:

> I believe in the development of public power . . . but I call the attention of the Senate to the fact that when the act of June 22, 1936, was passed, it contained an explicit provision that whenever the Secretary of War sought to acquire land in one state for the benefit of another, the consent of the state within which the land was to be acquired must be obtained. . . . There is no opportunity presented here (in the flood control bill under consideration) by which the states in which the land may now be condemned without the consent of those states, and taken, may be reimbursed, from the development of power or anything else.

THE real purpose of the section of the flood control bill which caused the furor was revealed by Representative John E. Rankin of Mississippi, leader of the so-called "public power bloc," in a speech to the House:

> I seriously doubt if all of you realize its far-reaching effect. . . . The Federal government will now have the authority to develop the water power on the Connecticut river, the Savannah river, the White river, the Red river, and all other navigable streams and their tributaries, generate and distribute that power at yardstick rates. In other words, we are prepared to establish a yardstick in every section of the country. . . .

So far, at least, there is no well-defined movement to nationalize the power industry, in the sense that it should be conducted exclusively by the central government at Washington. There is, however, a definite trend toward public ownership—by the Federal government, by states, by districts within states or embracing parts of two or more states, by municipalities, and by rural groups in the form of coöperatives. The extent of this movement has not yet dawned upon the public consciousness.

Aside from the Tennessee Valley Authority, which covers parts of seven states, the biggest bite of public ownership yet attempted is a plan to swallow the entire state of Nebraska. The moving force consists of three public power districts liberally endowed with PWA loans and gifts. These local groups, which are themselves building large

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hydroelectric plants, have joined forces in an attempt to buy all the privately owned electric utilities in the state. They may succeed (although the outlook at this writing is rather cloudy).

How much more plowing by conscientious public ownership advocates and by their politically motivated associates—how much more fertilizing of the soil by Federal contributions—will be needed to increase the crop of publicly owned power systems to a point where private enterprise will be relegated to second position and therefore well advanced on the road to oblivion?

"Let us here and now begin our struggle for government control and ownership of public utilities," exclaimed Senator Lundeen of Minnesota on the Senate floor.

"Amen," was the unvoiced response of a surprising number of Senators.

It can't happen here? Maybe not. But—

The number of municipally owned electric plants, as reported by the U. S. Census Bureau, mounted steadily from 815 in 1902 to 2,581 in 1922, then dropped to 1,802 in 1932.[1]

Then the direction was again reversed and the quinquennial count now being made, as of 1937, probably will show the number of municipal plants to be above 1,900.

[1] It should be noted that whereas these figures accurately reflect the number of municipal plants, and therefore represent the number of cities and villages served thereby, the figures given in the census reports for "commercial establishments" (privately owned utilities) do not purport to record the number of communities served by private enterprise. Thus, while the number of "commercial establishments," due to mergers, etc., decreased from 2,805 in 1902 to 1,627 in 1932, the number of municipalities served by such establishments increased substantially.

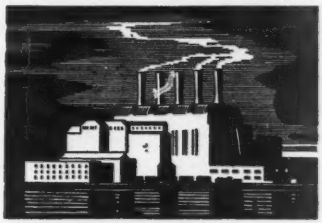
At the beginning of the hectic 20's, the installed generating capacity of all publicly owned electric plants in the United States (Federal, municipal, etc.) was 690,409 kilowatts, only 5 per cent of the combined capacity of publicly owned plants and privately owned utilities. By the end of 1937, the publicly owned plants had increased their capacity to 3,658,658 kilowatts, which was more than 10 per cent of the total. Within five more years, under construction programs now definitely planned, the proportion of publicly owned generating capacity will exceed 20 per cent.

THE government is building, or preparing to build, a dozen great hydroelectric power plants in the Tennessee valley. They are intended ultimately to have power-generating capacity approximately equal to that of the dozen or more privately owned utilities which serve the same area.

The government is building two huge electric plants in the Northwest —Bonneville and Grand Coulee— which are designed to have far more generating capacity than all of the privately owned utilities in the states of Idaho, Montana, Oregon, and Washington.

The government is building a large hydroelectric plant in California—the Central Valley project; is preparing to build five smaller hydroelectric plants in Colorado — the Colorado-Big Thompson project.

The government has already built the great Boulder dam hydroelectric plant, which was designed to become the world's biggest power producer but was shoved into second place by Grand Coulee as now planned.



Trend toward Public Ownership

"So far, at least, there is no well-defined movement to nationalize the power industry, in the sense that it should be conducted exclusively by the central government at Washington. There is, however, a definite trend toward public ownership—by the Federal government, by states, by districts within states or embracing parts of two or more states, by municipalities, and by rural groups in the form of coöperatives. The extent of this movement has not yet dawned upon the public consciousness."

The government also has built, through the Bureau of Reclamation, more than a score of comparatively small hydroelectric plants scattered through the Western states, and some of them are in process of enlargement.

The government is trying to negotiate a treaty with Canada that will enable New York state to build a huge hydroelectric plant on the St. Lawrence river.

THE government even started to build the fantastic Passamaquoddy project on the coast of Maine, but, after $7,000,000 had been spent, Congress scotched this scheme to develop power from the tides. Some of the public power devotees have not abandoned hope of reviving it.

The government has given and loaned more than $155,000,000 for the construction or improvement of non-Federal publicly owned electric plants, including at least 80 municipal systems in communities which are already served by privately owned electric utilities.

The government has directly promoted the organization of about 350 rural electric coöperatives (quasi public agencies) and loaned to them more than $150,000,000, which sum is being increased at the rate of $40,000,000 annually, plus an extra sum of $100,000,000 provided for the current fiscal year in the work-relief appropriation act.

Every hydroelectric plant built by private enterprise since 1920 under license from the Federal Power Commission is subject to "recapture" by the government after fifty years of operation. The Federal Power Act, however, also expressly reserves the right for the United States or any state

or municipality at any time to take such property by condemnation proceedings. The law, of course, provides for payment of "just compensation" —which is to be based on "actual legitimate cost" allowed by the Federal Power Commission.

PERHAPS no serious objection could be made to Federal development of power in conjunction with the building of dams that really are desirable and economically feasible for the improvement of navigation, prevention of floods, or the reclamation and irrigation of land. The people doubtless agree with President Roosevelt that "state-owned or Federal-owned power sites can and should and must properly be developed by government itself," as he said at Portland, Oregon, in 1932.

Probably it is equally true that if all the people had an opportunity to speak to the specific point, a substantial majority would agree with the President's further statement that "private capital should be given the first opportunity to transmit and distribute the power (so developed) on the basis of the best service and the lowest rates to give a reasonable profit only."

But how was that credo of Candidate Roosevelt translated into legislation under the sponsorship of President Roosevelt? Not by giving private capital the first opportunity but by specific provisions in all New Deal power laws that preference shall be given to "public bodies"—states, public power districts, counties, and municipalities, as well as coöperatives.

Nobody knows the sum that will be used to represent the total "cost" of the government's investment in power plants. The total estimated cost of the Federal projects is known, but these developments are all ostensibly for the improvement of navigation, or the prevention of floods, or for the reclamation or irrigation of land, or maybe for national defense. The generation of electricity is supposed to be incidental. That is a legislative and judicial fiction.

IT is a fact, of course, that each of these Federal projects has a purpose other than power production. But with respect to many of them there is ground for suspicion amounting almost to certainty that the "incidental" power is really a case of the tail wagging the dog.

Illustrative of this, harken to Senator George W. Norris at a Senate committee hearing on the Bonneville project in 1936:

> I do not believe that the committee or the Congress should forget that the constitutional peg upon which all this legislation is based is navigation.

And note the following comment by John C. Page, Commissioner of Reclamation, at a House committee hearing in 1938:

> Except for this power development the Casper Alcova (project in Wyoming) should never have been built, because it is not a feasible project on the basis of irrigation alone.

Arthur E. Morgan, deposed chairman of the Tennessee Valley Authority, told the joint committee of Congress which is investigating that Federal agency:

> While constitutionally electric power is subordinate to navigation, in practical importance and interest with many of those who promoted the TVA Act it has been dominant, and was one of the principal reasons for establishing the authority. . . . But for the power issue, the TVA dams never would have been built.

REVERTING to the cost factor, it is a fact that the Tennesee Valley Authority's program, as now laid out, is estimated to cost more than $500,000,000, and that the other Federal projects involving power production will cost $800,000,000. With the addition of gifts and loans to states, power districts, municipalities, and coöperatives, the total "gross investment" exceeds 1½ billions of dollars, of which an undetermined amount will ultimately be charged to the social benefits of flood control, navigation, etc.

The loans to local public and quasi public agencies are, of course, to be repaid to the government—provided these agencies, during the next two or three decades, are efficiently managed and take in enough money from power sales to permit the retirement of the debts.

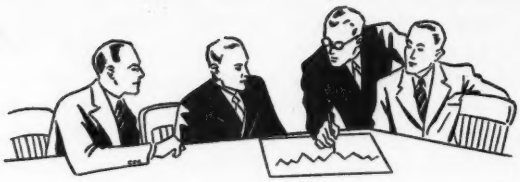
Just as the indefensible excesses of brewers and distillers culminated in their ruin, so have the privately owned electric utilities been largely to blame for their present troubles. It is doubtful that a majority of the people of the United States favor public ownership of electric utilities. Probably a majority did not favor national prohibition in 1918. Yet it was then made to appear that there was no other way to combat the ravages of "demon rum."

Can the privately owned electric utilities avoid a similar pitfall?

The Case for Autonomy of Regulatory Agencies

"ASSUMING the social objectives of regulation to be defined in general terms by legislative action (frequently an unwarranted assumption), practical administration involves the formulation and application of such procedures as will most expeditiously secure the ends in view. These procedures should be as informal, nontechnical, direct, and economical as the nature of the work permits. Commission or other responsible officials, should be free, within whatever range of latitude seems to them necessary and practicable, to promulgate rules of procedure, to delegate authority to subordinates, and to consult with staff technicians in the preparation of findings and orders. Final responsibility for decisions should rest squarely on the commission or officials designated by statute. The ultimate, and only socially justifiable, criterion by which the effectiveness of such regulation should be judged is its social consequences. Results are the major consideration; the method by which such results are attained is of secondary or incidental significance—a mere means to an end. No regulatory agency can properly be held accountable for socially desirable results unless it is free in respect to the procedures necessary to secure those results."

—HORACE M. GRAY,
Professor, University of Illinois.



The Effect of Added Business On Rate Reduction Losses

Current demands for further and drastic decreases in the charges for service, based upon revenue gains that may possibly result, are, in the opinion of the author, lacking in either experience or theory.

By LUTHER R. NASH

THE fact that there have been consistent reductions in rates for electric power service since the beginning of the industry is well known. The present average rate for residential service is less than 50 per cent of the prewar level, whereas the cost of living, including that of electric service, is 50 per cent higher. The reduction in charges for electric service has been due to two main causes, changes in the rate schedules and increase in use under existing schedules. The latter has been important as the average annual consumption has increased since 1913 from 264 to 793 kilowatt hours, a threefold increase. The reductions in schedules have been due largely to reductions in power costs and general increases in efficiency. The tendency in the schedule changes has been to make the charges for both large and small consumption more nearly consistent with their cost, based on carefully prepared analyses. The lowering of the charges for large consumption has been a large factor in the increase in average use.

Many rate schedule reductions have been made voluntarily in the hope of lower unit cost through larger volume of business. Other reductions have been prescribed by regulatory commissions as the result of complaints, sometimes from customers themselves, but often from political leaders or candidates for public office. Many surveys of customer sentiment by independent agencies have failed to disclose any general concern over electric service costs in the absence of some public agitation. An item of less than 2 per cent in the family budget does not naturally attract much attention. Nevertheless, the demand for lower rates has not only continued but has increased in intensity.

AN important factor has been the so-called "yardstick" rates devel-

oped by projects operated by governmental agencies, notably TVA. The comparability of many such yardsticks has yet to be demonstrated, but they have led to the proposition that lower rates mean vastly increased consumption and revenue, and should therefore be profitable to privately as well as publicly operated projects. The fact has not been adequately stressed that privately owned properties must not only remain solvent but also maintain their credit through the necessary period of losses from rate reductions whereas direct or indirect resort to taxpayers is available to publicly owned projects.

Following the wide publication of the large increases in consumption and gains in revenue resulting from radical rate reductions by municipal plants, particularly those supplied with TVA power, the agitation for similar reductions by privately owned plants was intensified without due regard for the fact that in many cases the cost of developing this added municipal business was not borne by them. Several months ago the Federal Power Commission issued an order to all electric power companies, public and private, to report to it the details of all rate reductions made since July 1, 1935, and the subsequent increases in revenue. It is expected that this information will be tabulated and widely distributed, and it may be assumed that it will be used to demonstrate the feasibility of further drastic rate reductions. The incomplete and inconclusive character of such data has not had the careful and widespread attention which it deserves. It is obvious that as rates are reduced toward the vanishing point, consumption may be radically increased, although the cost of current-consuming appliances becomes an increasingly important factor. Many homes could not afford electric service if it were given to them because of the cost of the necessary equipment, and only the more prosperous families can afford the more expensive major appliances, regardless of the cost of their operation. Nevertheless, residential customers in 1937 paid more for new and replaced appliances than they did for the current they consumed.

REDUCED rates will also increase revenues within certain limits, but that is not the whole story. Operating costs, taxes, and other current costs also increase and the point is reached where operating income begins to decline in spite of increased revenue. But that also, in turn, fails to complete the picture. Added business requires added investment with its necessary charges, and these must also be met if the business is to maintain its credit and secure the funds necessary for its continued growth.

Any useful questionnaire relating to the practicability of rate reductions should include not only their effect on sales and revenue but also on operating expenses, taxes, depreciation, investment, and charges thereon. The vital question centers on the rate of return on the investment required to carry on the enlarged business. A rate reduction which operates to curtail this rate of return to the extent of impairing credit is unwise and not in the interest of customers whose concern in the matter is a relatively minor one, as we have seen.

A voluntary supplement to any such incomplete questionnaire as that here

referred to, covering added expenses, taxes, and investment and all related charges and their combined effect on rate of return would be essential to completeness. It is understood that some such supplements have been prepared.

THE added cost of added business has been studied intensively in recent years. Such cost should include not only the immediate effects but also the permanent ones. At a particular time a utility may have excess capacity in power plants and lines and its organization may be ample to handle additional business. On the other hand, new business, although possibly small, may lead to substantial additions to investment or to personnel, involving more than normal immediate cost of the added service. Sooner or later each increase in service must carry its full normal costs and all rates should be designed with that objective.

Certain general observations may be pertinent in this connection, relating particularly to residential service. As far as investment is concerned, added business which does not improve load factor requires substantially proportional additions to production, transmission, substation, and distribution systems. Improved lighting is of this character. Added business which does improve load factor, such as refrigeration, radio, and cooking, requires less than proportional increase but rarely an entire absence of any. As an extreme example, restricted water heating needs no investment in production or general distribution equipment, but may require a substantial addition to transformer and service capacity and meter and control equipment, which is normally a large proportion of the investment required for residential service. If new customers are added as the result of lower rates, they may require an investment much greater than that of older customers because they are more remote and more scattered. Nearly one million such customers were added in 1937. In short, there is no new or added business that does not require added capital.

WHEN we examine the effects of larger volume of business on operating expenses, we find a somewhat similar situation. Added kilowatt hours, of course, mean added costs for fuel, wages, and other production items, or cost of purchased power. Distribution costs are less directly affected other than for new customers. The so-called customer costs do not increase proportionally for routine additions to service but may increase more than proportionally when other than the con-

¶ *". . . the effects of general business conditions, whether depression or prosperity, have a marked effect upon sales of appliances upon which growth in consumption largely depends. A large increase in sales and revenue following a reduction in rates may be due to a recovery of prosperity period in the business cycle rather than lower rates. The reverse situation may also occur and be equally inconclusive."*

ventional equipment is installed, calling for engineering attention and more frequent servicing. It should here be noted that when utilities are forced to make drastic rate reductions they abnormally increase their new business expenditures, including payroll, advertising, and promotion of appliance sales in a concentrated effort to offset the inevitable losses as speedily and completely as possible.

While general expenses are less directly affected, observations over a period of years with growing business indicate that they continue at about the same percentage of revenues, with only a moderate downward tendency. The complications of the new accounting systems are adding many millions of dollars to operating expenses which might otherwise be devoted to rate reductions. Taxes are largely dependent upon investment, income, and revenue, the last-named factor constituting a growing and discriminatory item. The average electric power company now pays in taxes about one dollar out of every six which it collects from its customers. It is to be expected that depreciation charges will also be substantially increased under the new accounting regulations.

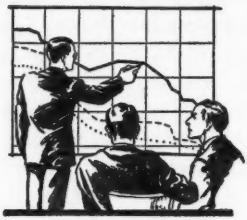
WHILE some of the foregoing matters are not directly related to rate reductions, they are coincident, disturbing factors which tend to make hopeless some otherwise solvable situations.

In view of wide differences in local conditions and the general complications outlined above, it is difficult to estimate very closely the effect of a certain rate reduction upon distributable income. It is possible, however, to forecast approximately the extent of kilowatt-hour sales increase required to offset all losses and costs resulting from assumed rate reductions.

As a first step, let us assume recovery of revenue following only a 5 per cent rate reduction. Although some new customers will be secured, the bulk of the required new business will come from existing customers and will be at the lower end of the rate schedule rather than near the top, with the result that the average rate applicable to the new sales will be not over two-thirds of the existing average. This means the sale of proportionally more kilowatt hours or 7½ per cent increase to recover 5 per cent loss in revenue. The cost of producing these added kilowatt hours and charges on the added investment required are not recovered.

IN order to restore former operating income, it will be necessary to sell more kilowatt hours. If this added business with its relatively low rates and higher cost of acquisition and added taxes can be handled with a 50 per cent operating ratio, then another 2½ per cent must be added to the revenues and 3¾ per cent to the kilowatt hours, making the total increase in the latter 11¼ per cent without any provision for additional investment charges.

It is, of course, reasonable that the added investment should earn not only a fair return but also depreciation charges, amounting together to 10 per cent. It will be assumed that the added investment is $3 for each $1 of added revenue, only one-half the full average investment. These added charges amount to 30 cents for each dollar of new revenue, which so far has been



Restoration of Former Operating Income

"In order to restore former operating income, it will be necessary to sell more kilowatt hours. If this added business with its relatively low rates and higher cost of acquisition and added taxes can be handled with a 50 per cent operating ratio, then another 2½ per cent must be added to the revenues and 3¾ per cent to the kilowatt hours, making the total increase in the latter 11¼ per cent without any provision for additional investment charges."

accumulated to 7½ per cent. If 30 per cent must be added to the new revenue for investment charges, it will be further increased by 2¼ per cent to a total of 9¾ per cent. But this further revenue involves more operating expense and taxes for more kilowatt hours, which in turn call for more revenue, the revenue and kilowatt-hour totals now amounting to about 11 per cent and 15 per cent, respectively. We have still failed to provide for the investment required for the supplementary kilowatt hours which would call for more revenue, more kilowatt hours, more investment, still more revenue, and so on in a diminishing series of factors, none of which is fanciful although it may superficially appear so.

THE foregoing figures are much more conservative than others relating to specific properties, developed in much more detail and indicating that the method here used, if carried more nearly to conclusion and with less conservative assumptions, would show a necessary increase in kilowatt hours approaching 25 per cent to restore a full fair return after a 5 per cent revenue reduction. It should be clear that increases of such magnitude are rarely to be expected except over a period of years and would result in confiscation unless existing rates were yielding substantially more than a fair return. If such excessive return exists, its correction is not to be questioned. In many of the actual cases in which reductions of such magnitude have been made, it is probable that not only did previous revenue appear excessive but also that a deficiency existed for some time thereafter.

The assumption on which this discussion is based is that rate reductions will bring about increases in use sufficient at least to offset losses in revenue.

That this assumption may be far from correct is disclosed by certain careful studies of actual consumption trends over a period of years. Most of these have not been published, but one by H. A. Snow of The Detroit Edison Company appeared in the June, 1938, issue of *E. E. I. Bulletin*. These studies indicate that consumption increases, which are the normal experience of the industry, are not materially different after rate decreases than at other times, including those when rate increases were necessary.

It has been the writer's experience during many years of intimate contact with rate problems that not only consumption but revenue will normally continue to increase from year to year without being substantially affected by the presence or absence of rate changes which were made voluntarily in response to more favorable operating conditions or were equitably prescribed by regulatory authorities. Any permissible rate reduction is only a minor fraction of one per cent of family living costs and cannot be an important factor in the many and diversified demands on the available income.

If this diagnosis, based on typical statistical records, is accepted, the drive for further rate reductions, based on yardstick comparisons, increases in revenue, or for other reasons than proven increases in distributable income, is lacking in equity and is not in the public interest. The studies here referred to have indicated that other reasons than rate reductions have been important factors in the spectacular increase in home consumption in recent years, this consumption now averaging about 800 kilowatt hours as compared with half that amount only twelve years ago.

The use of major appliances, which is largely responsible for this increase, involves large investments. Recent years have seen drastic reductions in the cost of refrigerators, ranges, water heaters, and radios as well as marked improvements in efficiency and reliability. The savings in initial cost of such equipment far exceed the annual electric bill covering its use. Installation and wiring costs have also been reduced and instalment payments made more attractive. It is logical that an investment of $100 in an appliance should have much closer scrutiny than a difference of a very few dollars in operating cost.

Furthermore, the effects of general business conditions, whether depression or prosperity, have a marked effect upon sales of appliances upon which growth in consumption largely depends. A large increase in sales and revenue following a reduction in rates may be due to a recovery of prosperity period in the business cycle rather than lower rates. The reverse situation may also occur and be equally inconclusive.

A broader view of the industry picture may here be helpful. The unit cost of residential service has been reduced in each of the years since prosperity vanished in 1929. With a negligible exception, the use of service increased in each year, the increase from 1929 to 1937 being in round figures from 13 billion to 17½ billion kilowatt hours. In the same period revenues increased from about $600,000,000 to $640,000,000, a relatively small increase. The increase in average cus-

tomer consumption of 394 kilowatt hours during these years was accompanied by an increase in average monthly bill of only $3.37, an increment cost of only a little more than one cent per kilowatt hour, for which rate reductions were in part responsible.

Net income figures for the industry's residential service alone are not available, but Edison Electric Institute has reported operating income of all privately owned companies from all classes of electric service since 1932, and therefore covering the period of intensive demand for lower rates as the source of greater profits. In that year the total operating income was $738,000,000. Preliminary figures for 1937 show $735,000,000. In the same period $1,500,000,000 was spent for property additions and improvements. In spite of large increases in consumption and moderate gains in revenue, the cost of the added service and other necessary increases resulted in an actual loss in income, with no provision for carrying the large added investment.

APPARENTLY the theory of added income from reduced rates, although superficially attractive, has not worked. While economic conditions during this period have not been favorable, the showing clearly indicates that even ideal test conditions would not reverse the picture. This does not mean that reductions in rates should not or will not continue. Under modern rate design methods, uninfluenced by political considerations, the unit cost of service is automatically reduced as use increases. Cost studies have shown the extent of fixed costs applicable to all customers and those that vary with use or load factor. Modern rates provide for reduction in charges after fixed costs have been absorbed and as load factor improves. When the various rate steps have been adjusted to corresponding costs, no further changes in the schedules themselves are necessary unless cost conditions change. As each customer's use increases, the unit cost of his service decreases without any formalities. Some of the largest reductions in average rate have also been made without loss in revenue from previously existing sales, these reductions affecting only increased consumption under so-called "objective" rates.

Not all rates are now so adjusted but the adjustment process is steadily going on and is in evidence in the many rate changes which are voluntarily being made. If other changes inconsistent with this program are forced upon the industry, such as inadequate "top" rates or their insufficiently broad coverage, orderly progress is upset and an unbalanced schedule prevents that expansion of service which leads to lower costs and still lower rates.

¶ "EXPERIENCE *has shown that the incentive for expansion of service, such as the industry's history discloses, has come mainly from the bottom of the rate schedules rather than the top, unless the latter was unusually high. History shows consistent rate reductions which, on the whole, have been orderly and progressive and applied as and where differences between costs and rates became apparent.*"

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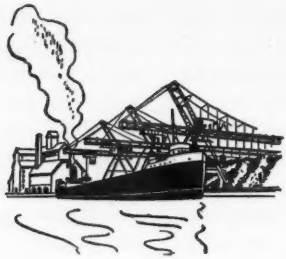
In spite of the foregoing qualifications and explanations it may seem that the computed requirements as to added kilowatt-hour sales necessary to offset all losses from even a moderate rate reduction are inconsistent with past experience. Many reductions exceeding 5 per cent have been made, some of them voluntarily, and the companies have not only not been wrecked but have maintained their credit and continued to expand. There are adequate reasons for this apparent discrepancy. As the industry has grown, its unit costs have been reduced and rate reductions, sometimes large if they have not been consistently frequent, are needed to reduce the rate of return to investors to normal levels. It has frequently happened in rate cases that when distributable income from the property as a whole has been found excessive, reductions have been made in residential rates because of pressure for such reductions, rather than in other schedules which might be responsible for the excessive income. Cost analyses have commonly shown a relatively low return from residential service; but, in spite of that, further reductions have sometimes been made voluntarily to avoid extended controversy, fostered by the recurrent publication of news releases proclaiming the remarkable results of some low municipal rate. It should, however, be noted that undeserved reductions in certain schedules in place of deserved reductions in others are discriminatory, even though made with official approval, and may have an unbalancing and depressing effect on the business as a whole.

IT should further be noted that revenue from residential service is normally only one-third of the total revenue of an electric power company and it may be possible to absorb substantial temporary losses without too severe effect upon total income, particularly if other classes of service are showing marked growth. Even without such advantages, normal growth, without undue handicaps, should permit frequent moderate reductions in charges. Such, at any rate, has been past experience, without, however, the recent experience of progressively higher and more comprehensive taxes, higher wages and shorter hours, increased fuel cost, and greater executive and accounting expenditures incident to new problems of regulation, public relations, and competition.

This discussion will have accomplished its purpose if it has made clear that current demands for further and drastic rate reductions, based upon revenue gains which may possibly result therefrom, are lacking in any adequate justification in either experience or theory. The effect of such reductions extends far beyond revenue, including in some measure the range of operating costs, taxes, depreciation, and return on added investment. None of these factors, it will be found, is wholly absent in any case.



The St. Lawrence Seaway—Reality or Rainbow?

There is good reason to believe, in the opinion of the author, that if the treaty with Canada, now proposed, is to get by in the United States it will only do so as a White House "must" measure.

By FERGUS J. McDIARMID

WHEN traveling through the flat country to the southwest of Montreal, do not be surprised to see passing through the fields among the cattle and the waving grain a sizable steamer. The cattle do not raise their heads, for such vessels have been navigating their pastures for many years. They have been passing, of course, through one of the canals which permit passage around the rapids of the St. Lawrence through which the river drops 226 feet from Lake Ontario down to Montreal. These boats cannot exceed 270 feet in length and they must not draw over 14 feet of water, for this is the maximum capacity of this canal system. They are known in the parlance of the lakes as canal boats. Their maximum carrying capacity is a little over 2,000 tons of wheat, a sizable cargo but only a fraction of the capacity of the largest vessels which navigate the Great Lakes.

This St. Lawrence canal system is the weakest link in the system of navigation which connects the head of Lake Superior with the Gulf of St. Lawrence. Nevertheless, it represents an investment by Canada of $50,000,000. In addition Canada has spent $60,000,000 to provide a 35-foot channel in the St. Lawrence below Montreal. She has spent $130,000,000 to build the Welland ship canal which has a present depth of 22 feet but which can be deepened by dredging to 27 feet. Predecessor Welland canals cost $35,000,000. Adding up these various items indicates an expenditure to date by Canada in the Great Lakes-St. Lawrence seaway for navigation alone of $275,000,000.

In comparison with this figure the contributions of the United States have been relatively small. Her major con-

tributions have been the 24½-foot canal at the Soo, and the dredging of the Detroit-St. Clair river passage to a depth of 25 feet. The cost of these has been $14,000,000.

THESE facts form the background for the treaty recently proposed by the State Department of the United States to complete the seaway, by the provision of a 25-foot channel from Lake Superior to Montreal, and incidentally—or maybe not so incidentally—to develop 1,100,000 of hydroelectric horsepower for each nation on the St. Lawrence. No recent estimates of the cost of this project have been prepared, and the latest figures are those used in the proposed treaty of 1932 which was rejected by the United States Senate. They are based on 1926 prices and follow plans approved at that time by a joint board of engineers. The total cost was then estimated at $400,000,000. This was a minimum rather than a maximum estimate. It allowed nothing for interest during construction and covered only partially such items as rehabilitation works and the cost of land flooded. The division of the cost as proposed in 1934 and as again proposed at the present time would roughly tend to give Canada an initial credit equal to her $130,000,000 expenditure on the Welland canal link and would divide the balance of the cost equally between the two parties.

The expenditures actually contemplated are $142,000,000 for Canada and $258,000,000 for the United States. Of Canada's expenditure $90,000,000 would be spent to deepen the Welland canal and the canals in the entirely Canadian section of the St. Lawrence, $15,000,000 for canals in the purely Canadian part of the International section, and $37,000,000 for superstructures for power development purposes only. Canada's direct contribution would be supplemented by that of the Beauharnois Power Company, which, in consideration of the privilege of developing power on the St. Lawrence, is pledged to provide a 27-foot channel 15 miles long past the Soulanges Rapids, 25 miles above Montreal. This channel is not yet dredged out to the required depth and to do so would cost Beauharnois several million dollars.

THE United States' expenditure would cover all of the joint work in the International section of the St. Lawrence estimated to cost $153,000,000. Of this money approximately $55,000,000 would be spent in Canada. The wholly American part of the work in the International section is estimated to cost $27,000,000. Also the United States would spend $65,000,000 to complete the channel in the Great Lakes above Lake Erie.

The popular attitude in Canada toward the proposed new agreement is said to be one approaching apathy. That this should be so is indicative of a very great change in outlook. The dream of a deep waterway connecting the Atlantic with the head of Lake Superior is almost as old as the Dominion. It was nourished on the transportation scarcity complex with which the country was affected for many years. This complex was in turn based upon the idea that the chief economic function of Canada was to grow huge quantities of wheat with which to supply the markets of the world. Western Canada wanted the St. Law-

rence seaway to reduce the carrying charges on its wheat. It was during this period of the shortage complex that the Welland ship canal was begun in 1913. With its last dying kick this complex caused to be built that economic monstrosity, the Hudson Bay Railway.

SINCE that time the shortage complex has gone completely into reverse. Canada, with a railway system designed for twice her present population, has a railway problem. Most of the rail mileage is owned by the Federal government so that this problem strikes directly at the public purse. In sheer out-of-pocket cost it is a larger problem than relief. Viewed over a period of years, it has eaten up every dollar that the Federal government has collected from individual and corporate income taxes. It is the country's most pressing fiscal problem, and any move to add to the country's transportation facilities and so aggravate the already very serious railway problem will not go unchallenged.

Also, there are other angles. At a time when the states south of the border have been turning in their rights to Washington and taking the cash values, Canada has witnessed a resurgence of provincial power and a reemphasizing of provincial rights. Sometimes this is called sectionalism. A succession of crop failures has weakened the voice of the western wheat grower, and in any case, with the growth of economic autarchy throughout the world, there is some reason to believe that the growing and exporting of wheat will play a declining part in the Canadian economy. Moreover those two lusty provinces, Ontario and Quebec, speaking through two lusty premiers, Hepburn and Duplessis, have decreed that since it will be largely their lot to pay the seaway piper, it shall be theirs to call the tune. The tune that they are currently calling does not appear to favor the seaway.

TO most clearly appreciate the attitude of Quebec toward the seaway, one should visit the Port of Montreal. To a very appreciable extent Montreal is Quebec, for approximately half of the people of the province live in the Montreal metropolitan area. Commercially and financially the city dominates the province and no provincial government can hope to survive which does not pay strict heed to the interests of Montreal. Go down to the waterfront where the funnels of a dozen steamship lines rise behind the dock buildings. Electric locomotives jostle freight cars on and off the miles of docks. Grain is being sucked out of

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canal boats and poured into sea-going tramps. This is Montreal's biggest business and it makes the city, next to New York, the leading seaport in America. Montreal is the leading wheat-exporting port in the world.

Montreal has never liked the thought that she might cease to be the head of deep water navigation on the St. Lawrence. In this respect her position has differed only in degree from that of the American port cities of the Atlantic seaboard. However, as long as Quebec remained a faithful wheel horse of the Liberal party and as long as the West, which held the political balance of power, cracked the whip for the seaway, Quebec grumbled, Montreal moaned quietly, but there was no kicking over political traces. That was the situation when the Treaty of 1932 was ratified by Canada.[1]

SINCE that time a new force has taken Quebec by storm. This force does not take orders from Ottawa, in fact is scarcely on speaking terms with the powers there. Mr. Duplessis, who rode to power on a "Quebec First" platform, appears to have certain marked likes and dislikes. He is in favor of those things which appear to be in the interests of Quebec. He is against Communists and the St. Lawrence seaway. He has said so. If the Quebec contingent to the Dominion Parliament is hardy enough to ignore this fact if and when the new treaty comes up for approval, it will be made of sterner stuff than most politicians.

[1] At that time the Conservatives under Mr. Bennett were in power at Ottawa, but in the ratification of the treaty they were joined by most of the Liberal members of Parliament.

There appears to be some considerable doubt whether the fears entertained by the Port of Montreal with respect to the seaway will stand up under analysis. This is because the large bulk carriers of the Great Lakes are highly specialized ships. They are in effect long steel barges with propelling machinery in the stern. With very low operating overheads they can afford to spend long hours in canal locks and still provide the most economical transportation in the world. In the transportation field for which they were designed, ocean-going vessels with their relatively high overheads per unit of capacity would have difficulty in competing with these lake boats. At the same time the lake boats are not suitable for ocean navigation. Therefore, there is considerable reason to believe that the practical effect of completing the seaway would be to allow the larger lake boats, which now ordinarily do not come below Lake Erie, to reach Montreal, where their cargoes would be transferred to ocean-going ships. In this event Montreal would not necessarily lose, but might even stand to gain, by the diversion of traffic from American trade routes. However, Buffalo, the American railroads, and the Atlantic ports of the United States cannot take so optimistic a view. Particularly at stake is the large volume of Canadian wheat which now goes abroad via Buffalo and the U. S. Atlantic ports, but which would almost certainly be diverted to the St. Lawrence route on the completion of the seaway.

IN spite of Montreal's opposition, Canadian interest in the navigation features of the seaway has always ex-

Fear of Power Shortage

"It was the Ontario Hydro Electric Power Commission which originally advocated the development of power from the [St. Lawrence] seaway in 1924. In that optimistic period there existed in Ontario a fear of power shortage which was probably a hang-over from the war. A system entirely dependent on hydroelectric power must contract for its power requirements a long time ahead. Hydro contracted to buy large blocks of power from several Quebec power companies."

ceeded that of the United States. This is reflected in the amounts of money which each party has spent to date on the project. American interest in Great Lakes navigation centers on the shuttling of ore and coal between upper and lower lake ports with the shipment of wheat as a rather secondary matter. Canada's dominant interest, on the other hand, has to do with the shipping of wheat from the head of the lakes to Europe. The fact that the St. Lawrence development is now being pushed by the United States rather than by Canada is a clear enough indication that emphasis has shifted from the navigation to the power features of the project.

It is practically inevitable that any power accruing to Canada from the development of the International section of the St. Lawrence will have to be absorbed by the Hydro Electric Power Commission of Ontario. Accordingly, in 1932 the Dominion government negotiated a separate agreement with the Ontario government whereby the province agreed to pay the cost of power superstructures and to reimburse the Dominion for the cost of other works attributable to power only. Under this agreement the Dominion would have received an estimated $104,000,000 from Ontario, so that its total net outlay to complete the entire project would have been only $38,000,000. However, this agreement lapsed with the failure of the United States Senate to approve the treaty and it will now be necessary for the Dominion government to negotiate a new agreement with the province. Ontario in the interim, having undergone a change of government among other things, has waxed hard boiled in financial matters. In estimating the cost to her she has added $15,000,000 of interest during construction to the estimated $104,000,000 of direct cost.

On whether or not Ontario is willing to spend $119,000,000 for 1,100,000 horsepower of electric power will in no small measure determine Canada's attitude toward the entire scheme. It was the Ontario Hydro Electric Power Commission which

originally advocated the development of power from the seaway in 1924. In that optimistic period there existed in Ontario a fear of power shortage which was probably a hang-over from the war. A system entirely dependent on hydroelectric power must contract for its power requirements a long time ahead. Hydro contracted to buy large blocks of power from several Quebec power companies. Hydro engineers estimated that their system could absorb all of this power and in addition all of the power that the St. Lawrence seaway could produce by 1945.

The depression illustrated the danger of leaning too heavily upon the extrapolation curves of overoptimistic engineers. This lesson had not been fully driven home when in 1932 Hydro was willing to assume responsibility for the absorption of the St. Lawrence power. However, even today with its load close to an all-time high Hydro has a rather large surplus of power on tap which it is paying for but not using. This surplus may increase as substantial additional blocks of power, which have been contracted for, have to be taken up over the next two years. As long as this remains the case, the government of Ontario is going to be rather slow to assume responsibility to take on a huge block of additional power. This will be especially true of a government which has roundly criticized its predecessor for biting off more power than it could chew.

JUST how large a sum does $120,000,000 appear to Ontario? Admittedly in the light of United States Federal government finance it is chicken feed. However, $120,000,000 is equal to nearly one-fifth of the gross debt of Ontario, or to 1¼ times a year's revenue for the province. It is equal to over one-quarter of the entire investment in the provincially owned power system.

Anyone who is trying to talk Mr. Hepburn's government into spending $120,000,000 should bear in mind that he is dealing with a government which is attuned to budget balancing rather than to deficit financing, a government which has been appealing to the voters through the medium of tax reductions, rather than through handouts from the public treasury. Because of the way in which the Ontario government, and its agent Hydro, keep books, the assumption of a large block of unusable power can only mean higher electric rates for the people of the province.

And who can say what the ultimate cost will be? Through costly experience Canadians have become skeptical of cost estimates of large public projects. The Welland canal, the Queenston power development, and the Hudson Bay Railway were expensive lessons in this hard school. Such cost estimates are often based upon political rather than engineering considerations. It is safe to say that the cost estimates for completing the St. Lawrence seaway outlined earlier in this article are being taken in Canada with more than a grain of salt.

KNOWING full well that it was not chiefly Ottawa, but Mr. Hepburn's Ontario government at Toronto which must be sold on the seaway and its attendant power development, the State Department at Washington has shown considerable skill in baiting the hook.

Ontario's Hydro has installed at Niagara more hydroelectric generating capacity than the water available under the present International agreement will run at capacity.

For years Hydro has wished to divert water from the Hudson bay watershed into the Great Lakes system and to use an equivalent amount of water at Niagara for the manufacture of almost costless additional power. To date the United States has withheld its consent to this procedure, but if Canada will sign on the dotted line now, Hydro can use this water and more besides, for the United States will agree to the joint diversion of additional water at Niagara for power purposes. In order that honeymooners will not be the losers, Uncle Sam will coöperate with Canada in constructing works to preserve the scenic beauty of the falls.

The United States will put an end to the illegal diversion of water at Chicago, known in Canada as the Chicago Water Steal. As a concession to Mr. Hepburn's Old Deal style of bookkeeping, Ontario will be allowed to defer for an indefinite period the building of the power superstructures on her side of the International section.

IN what light does that astute and forceful Quebecer, Mr. Duplessis, view the power aspects of the project? In its flow through the Province of Quebec above Montreal the St. Lawrence drops 83 feet, which is sufficient to develop 2,000,000 horsepower of electrical energy. To date only 640,000 horsepower has been developed. If more is to be developed, the logical market for much of it is the Province of Ontario. However, if Ontario were to participate in the development of a huge block of power farther up the river, the market for the power from Quebec would be greatly impaired, as would be the Quebec government's chance of deriving additional tax revenue therefrom. However, Washington has not forgotten Mr. Duplessis entirely. It has agreed to withdraw the present embargo on the export of additional power from Canada to the United States—if the treaty goes through. Maybe Mr. Duplessis will be able to sell some of his power south of the line. This provision is meant to appeal to Mr. Hepburn also, who has on his hands a current power surplus. It is to be hoped, for the treaty's sake, that neither of these gentlemen entertains any doubts as to the ability of the northeast corner of the United States

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to absorb almost unlimited additional quantities of power.

If Canada will just agree to the treaty, it appears that everything will be fine and dandy for some, but probably not for everybody. There are indications that what the Federal government mainly desires is not to create a deep channel from the Great Lakes to the sea, but to fashion a rod wherewith to chastise those unregenerate sinners, the utilities of the northeastern states, particularly New York. For Canada is to be given to the end of 1949 to "provide for" her share of the navigation features. There seems to be some doubt in the Canadian press as to whether this means completing these works or merely initiating them before 1950. Perhaps, however, this point should not be overstressed. What does appear important to Mr. Roosevelt—for it is his baby—is for Canada to coöperate in throwing a dam across the St. Lawrence in order to get water coursing through turbines on the American side as quickly as possible. It is calculated that this could be accomplished within four or five years of the signing of the treaty.

It is conceded in Canada that the proposed treaty offered by the United States is about as favorable a one to Canada as could be conceived. No doubt its lukewarm reception up there stems in part from the hard going that this treaty is likely to encounter in the United States Congress. It has been the unfortunate experience of foreign countries to give their assent to agreements which have their origin in the United States only to be rebuffed later by the American Senate. Such an experience has all of the humiliating characteristics of a bride's being left standing at the church door, while the groom, who did the proposing, is dragged off to the woodshed by an irate parent for having contemplated such a match. This is exactly what happened to Canada in 1935. The treaty then proposed by Mr. Roosevelt's government did not differ materially from the present one. It is true that a few clauses designed chiefly to sweeten Ontario have been thrown in. However, these clauses do not tend to assuage the opposition at home.

Is Congress likely to view more favorably the present treaty than it did the former one? The arguments for and against remain about the same in nature, although the arguments against the project appear to have gained relatively in weight. A most important consideration is the probable effect which the seaway would have on competing forms of transportation — notably the railroads. If the rails were unwell in 1934, they are deathly ill today. Their problem by the sheer weight and seriousness of it has forced itself upon the consciousness of the people and of Congress. It now appears that that process by which railroad transportation has been subsidized by the confiscation of investors' equities is reaching the end of its tether and only the public treasury remains. In view of these facts, can another Panama canal be permitted?

At the present time the whole matter is likely to hinge to a considerable extent on whether or not the country wants any more TVA's. A recent poll has pointed to the TVA as one of the least popular of the administration's fields of activity. It is entirely

probable that the present congressional probe into the TVA will prove detrimental to the success of the St. Lawrence development. There are signs that Congress is souring on such projects—witness the difficulty in obtaining an appropriation for the Gilbertsville dam and the attempted amendment to the Lending-Spending Bill, ruling out Federal aid for municipalities in building competing utility plants. The development of power on the St. Lawrence from an economic point of view has very much more to recommend it than have the various TVA developments. It is, therefore, unfortunate but almost inevitable that it should be judged at present in the public mind by the TVA yardstick. That is one use to which this much vaunted yardstick was doubtless not intended to be put.

It is inevitable that during the consideration of this treaty the cry will be raised that Canada is being given too much. Although it appears that in view of Canada's previous expenditures on the waterway the present division of costs is fair enough, nevertheless the fact that these costs will fall heaviest on the United States will not add to the popularity of the treaty. This is especially true of the provision that a considerable portion of the American expenditures are to be spent on Canadian labor and materials. This clause will doubtless give some patriots, who have on other occasions been most liberal with the public purse, good cause to vote against the treaty.

THERE is good reason to believe that if the treaty now proposed is to get by the United States Congress, it will do so only as a White House "must" measure. Can it be put across in this autumn of the administration when a similar treaty which was certainly no more favorable to Canada could not be put through the Senate when the New Deal was in its honeymoon? Already opposition has crystallized in the form of a statement by Senator Wagner that he is opposed. In the meantime up in Canada they are counting no chickens and entertaining no illusions. A recent article in the *Financial Post of Toronto* entitled "Uncle Sam Baits the Seaway Hook," concluded as follows:

"The U. S. is playing high politics by pressing the treaty at this time. This makes the future of the proposal highly improbable. . . . In the U. S., Senators in the Mississippi area will join those at Buffalo and the private power interests in opposing the treaty. Chances of the treaty being ratified by U. S. Senators seem less bright than five years ago."

World's Longest Telephone Line

"THE longest direct telephone and telegraph line in the world is now being built from Moscow to Khabarovsk, in Siberia, states Reuter. The new line will be more than 5,400 miles long, almost 1,250 miles longer than the direct line from Halifax to Vancouver across Canada, at present the longest line in the world. On the new line it will be possible to transmit simultaneously three telephone conversations, 19 cablegrams, and one telephoto over one pair of wires."

—The Electrical Review, London.

Wire and Wireless Communication

Aside from the FCC radio monopoly investigation, the hearings on which are now going on in Washington with the prospect of continuing past the holiday season, the most important and significant development of the last fortnight in the field of communications was the enactment, by the recent "lame-duck" special session of the Pennsylvania legislature, of a law forbidding public utilities to lease private wires for use in the dissemination of gambling information.

Ordinarily, such a police statute enacted by a single state would be of mere local concern, but in view of a suggestion for a Federal statute along similar lines made in the address by Commissioner Paul A. Walker of the FCC before the national association of the state regulatory commissioners at New Orleans on November 16th; and in view of the known mutual interest in the Pennsylvania telephone gambling situation among the Pennsylvania Public Utility Commission, the FCC, and the U. S. Justice Department, telephone companies all over the United States were wondering whether the new Pennsylvania statute might be a forerunner or model of Federal legislation which might possibly be introduced at the next session of Congress.

Chances of enactment of such legislation if introduced do not appear especially bright from a cursory examination of the 76th Congress as a whole. Few of the members of the new Congress have shown any interest in the matter and the only notable reaction on Capitol Hill to the FCC itself is likely to be one of critical inquiry. But this spirit is based upon the FCC's difficulties with radio regulation and it may well be that, if the final report of the FCC on the special telephone investigation recommends some Federal curb on interstate dissemination of horse-racing and other gambling information, congressional bills along that line will get at least as far as the committee-hearing stage.

In this connection, it will be recalled the Proposed Report of the FCC special telephone investigation contains the following passage (page 709):

> The facts regarding the use of leased wire services for the dissemination of racing news used largely in gambling operations, and the support given such services by Bell System companies in order to enjoy the revenues derived therefrom have been set out elsewhere in this report. Legislation is necessary to handle such problems. This commission has no jurisdiction over the matter. The facts developed in the course of the investigation demonstrate the serious nature of the problem and suggest the necessity for remedial legislation by the Congress.

Another factor in the enactment of the new Pennsylvania statute was the charge of the Republican opposition that Governor Earle had high-pressured this statute through a subservient lame-duck legislature on the eve of a shift of administrative control at Harrisburg simply to pay off a political grudge arising out of the recent bitter election campaign which witnessed the rout of the Democratic forces under the leadership of Governor

Earle. The attempted reprisal was reported to be aimed at a principal Republican backer who is commercially engaged in the dissemination of racing information in addition to the publication of a Philadelphia daily newspaper.

BE that as it may, irritated telephone men suspect that the new legislation will prove more burdensome to telephone companies than to either the professional gamblers or their clients (to whom the delay in information concerning the results of horse racing and other sporting events is likely to prove more inconvenient than prohibitive).

The new Pennsylvania legislation is actually incorporated in two distinct measures, one of which prohibits the publication or radio transmission of racetrack selections, probable odds, or prices paid. The second bill, known as the Thompson bill, is the one of immediate concern to wire communications utilities. So controversial did this measure become that its passage was threatened by lack of a quorum during the closing minutes of the Pennsylvania session. But industrious maneuvering by the Democratic forces at Harrisburg finally put the bill through both houses under forced draft. The ultimate roll call showed big majorities. The principal features of the Thompson bill were as follows:

1. It makes it illegal for telephone and telegraph companies to furnish leased wires to carry horse-race results from the tracks or other distribution centers to bookmaking or other gambling joints.

2. It provides that the dissemination of racing information by wire shall be construed conclusive evidence that the wire is being used in the furtherance of gambling and places the burden of proof on the utility furnishing the wire and the person to whom it was leased. That means either or both parties must prove that the wire was not being used illegally.

3. Penalties for violation of the act are one to three years' imprisonment or fines of from $1,000 to $5,000 on either the wire company or the person receiving the service.

4. Enforcement powers are vested in the public utility commission, which "shall have all the powers granted to it under the laws of this commonwealth."

5. It makes it unlawful for any utility to furnish any person a private wire without public utility commission approval and provides that the utility commission shall examine and investigate all applications for private wires.

6. Applicants for leased wires must furnish the public utility commission a detailed written statement of the purpose for which the wire is intended.

7. It makes it unlawful for any person who has been furnished a private wire by any public utility under the bill to use the wire for any purpose other than specified.

8. Named as equipment covered by the law are conduits, poles, wires, circuits, telephone, telegraph, Morse, loudspeakers, "or any other means by which the voice or electrical impulses are transmitted."

9. The act "shall be deemed an exercise of the police power of the commonwealth for the protection of the public welfare, health, peace, safety, and morals of the people of the commonwealth."

10. The act states that "it has been shown that the leasing of telephone and telegraph wires for the dissemination of information pertaining to horse racing has been used generally in the furtherance of gambling and plays an essential part in the operation of illegal bookmaking establishments and pool rooms, and has resulted directly and indirectly in the commission of other serious crimes, and the elimination of the dissemination of such information will be of material assistance to law-enforcement authorities enforcing existing laws against gambling and the maintenance of gambling establishments."

ASIDE from the expense and inconvenience of taking the commission administration of this class of service out of the ordinary routine, in order to comply with the new law with respect to written contracts, commission approval, and so forth, telephone men have two general complaints against it: (1) that it jeopardizes local public relations by virtually compelling the utility to assume the rôle of policeman against its own subscribers —particularly in communities where horse-race betting is not generally deplored but often patronized by the sporting classes of the citizenry; (2) that it unfairly shifts the burden of proof to the "accused" (in what is made a statutory criminal charge) under circumstances which a telephone company may not be able to control.

On the whole, telephone men are inclined to concede that leased wire service to professional gamblers is often a shady business and that they would not be par-

ticularly opposed to some form of statutory correction which would relieve telephone companies of possible liability (on grounds of service discrimination) if they refused service under such circumstances. But they are disposed to feel that the Pennsylvania statute is far too drastic in that it virtually forces a utility to become arbiter of the morals of a local community. It has been suggested that state commission action without formal statutory reform might be a solution.

As one Pennsylvania telephone executive, who recently visited Washington, said about rendering service to professional gamblers: "We don't need and we don't want that kind of money; besides, there isn't enough of it to make it worth while even if we did want it. But neither do we want to be put in the dog house by our own customers for enforcing puritanical ideas for which we are not responsible."

ELSEWHERE the telephone industry's difficulties with the gambling gentry seem to be clearing up. In St. Louis—a recent trouble spot in this respect—a plan to eliminate telephone service to handbook shops was voluntarily adopted at a meeting in the office of an attorney selected as spokesman for a group interested in breaking up organized gambling establishments in that city. The meeting was attended by representatives of the Southwestern Bell Telephone Company, the city police board, and the city council. The agreement was based upon a recent opinion by City Counselor Edgar H. Wayman to the effect that use of telephone service to transmit racing information violated an ordinance relating to the "stringing of wires" for illegal purposes.

In Miami, Florida, a charge of conspiracy to promote gambling houses through the operation of a telephone switchboard over which racing returns were said to be relayed to subscribers was dropped in the local court of crimes by the city solicitor's office. The dismissal resulted from a Florida Supreme Court decision sometime ago in a test case brought by officials of the Southern Bell Telephone Company, which held that the furnishing of racing information over a telephone switchboard is not a violation of state law. The conspiracy case at bar had been pending since September, 1936.

* * * *

WHILE attention of the press was distracted by the recent brief filed with the FCC by the Bell System in reply to the so-called Walker report (see page 847), another interesting telephone industry brief, also filed in Washington, escaped general attention. This was the brief filed with the Wage-Hour Administration by the United States Independent Telephone Association claiming exemption for local telephone companies.

The association's claim for exemption is based legally on § 13(a)(2) of the Fair Labor Standards Act of 1938 (Wage-Hour Law), which exempts local retail or service establishments from compliance. The act itself gives no further definition or clue as to what Congress intended to be covered by "service establishment." The association brief, however, argues that in view of the fact that small local telephone companies are not engaged in selling or making a tangible commodity but rather in the rendition of a local "service," they should logically fall within the meaning of the exemption. On December 7th, however, Acting Wage-Hour Administrator Paul Sifton indicated that such phone companies would probably not be exempted.

Comparing the Bell System with the independent industry, the association's brief shows that the Bell System owns and operates 6,778 exchanges, but that the independent companies operate 12,450 exchanges. It is on the density of subscribers per exchange, however, that the numerical preponderance of Bell service on a national basis is explained. On this basis the Bell exchange averages 2,262 subscribers, while the independent exchange averages 331 subscribers. The purpose of this information was to reveal the relatively low earning power, per exchange, of the independent industry as compared with the Bell System.

The state-by-state analysis along the same line was given in the brief as follows:

State	*Average subscribers per Bell exchange*	*Average subscribers per independent exchange*
Alabama	1,233	93
Georgia	1,349	134
Illinois	4,755	318
Indiana	2,291	375
Iowa	1,533	323
Kansas	2,190	201
Mississippi	468	83
Missouri	3,605	246
Nebraska	913	331
New York	4,108	594
Ohio	2,804	637
Oklahoma	1,377	149
Pennsylvania	3,297	487

To exemplify the argument that the application of even the preliminary 25-cents-an-hour minimum wage and statutory hour standard would have a disastrous effect upon the small local exchanges, the brief selected the community of Brownville, Nebraska, where the telephone exchange serves only 63 subscribers. If the management of this exchange had been compelled to pay the 25-cent minimum wage standard in 1937, the wages for the operator alone would have amounted to over $700 more than the exchange took in in gross revenue. This would, of course, exclude other necessary expenses for maintenance, repairs, and depreciation (not to mention return on investment). To afford such a wage increase, the Brownville, Nebraska, telephone exchange would have had to boost rates to subscribers approximately 300 per cent; and such an increase, it was pointed out, would be impractical because it would defeat its own purpose by provoking the abandonment of service.

ASIDE from the legal arguments, the association's brief reminds the Wage-Hour Administration that compelling the independent telephone industry to comply with the Fair Labor Standards Act of 1938 would inevitably result in curtailment of 24-hour service, abandonment of exchanges, the mechanization of exchange operation through remote control facilities (with attendant adverse consequences for labor), all of which were said to be in the opposite direction from the general intent of Congress in enacting such legislation.

Justifying low wages paid by small rural exchanges, the association's brief observed that the working conditions of operators on such exchanges were far different from industrial conditions in large cities or "sweat shops," to correct which the law was obviously designed. The rural telephone operator very often is employed in her own home (where the switchboard is installed for her convenience), for a few hours a day (subject to call by an alarm bell for occasional off-peak calls), and at wages which are understood to be supplemental rather than self-supporting (such as in the case of a widow endeavoring to maintain her own home with supplemental income by assuming the light duties of exchange operator).

* * * *

THE FCC continued activity at a spirited pace on a number of fronts in an apparent effort to clean up important pending agenda before the new Congress has a chance to act on various investigatory resolutions (directed against the FCC and the radio industry) which are expected to be reintroduced in the next session. Already Senator White of Maine has announced his intention to reintroduce a resolution to investigate the FCC, with special emphasis on its regulation of the radio industry to date.

Although a member of the Republican minority, Senator White's promise to press for an FCC investigation is significant by reason of the known support which he is likely to receive from Senator Wheeler of Montana, chairman of the Senate Interstate Commerce Committee. And, by very reason of this expected congressional investigation of the FCC, Washington observers are inclined to discount rumors that inner-circle New Dealers (including "Tommy" Corcoran) are even now preparing a ripper bill to junk the FCC membership. Congress would hardly vote a reorganization of a commission while it is still under congressional investigation. Such rumors became so persistent, however, that Chairman McNinch felt it necessary to issue a statement on December 7th denying any knowledge of ripper legislation.

Financial News and Comment

By OWEN ELY

System Integration Plans

THE passing of the recent December 1st "deadline" established by the Securities and Exchange Commission for the filing of tentative plans indicating compliance with § 11 of the Public Utility Holding Company Act brought into Washington a number of reorganization proposals affecting various holding companies which should prove of vital concern to investors. These plans (many of which are in barest outline) are subject, of course, to considerable revision, and final approval by the SEC may necessarily take a very long time in many cases.

While these integration plans, which were filed by 64 of the holding companies out of a list of 66 for which the SEC "deadline" had been originally set, were for the main part confidential, press reports included the following information:

The Electric Bond and Share plan provides for three major systems, one in the Northwest, one in the Texas area, and the third centering around Pennsylvania, the three systems being interconnected completely.

United Gas Improvement Company made public a letter to the SEC accompanying its plan. President Zimmermann pointed out that 64 per cent of the company's investments are in majority-owned companies and 36 per cent in other companies and miscellaneous items. Of the parent company's total investments approximating $332,000,000, about $157,000,000 is in the industrial and residential area extending from the Delaware river at Trenton across southeastern Pennsylvania, Delaware, and a portion of Maryland to the Susquehanna river. The company also has an investment of about $38,000,000 in the state of Connecticut, and a $59,000,000 equity interest in Public Service Corporation of New Jersey. It is interconnected with the latter company.

Engineers Public Service Company's plan, according to *The New York Times*, contemplates the setting up of two major integrated utility systems—one centering around its Virginia properties and one in the Gulf states area. Northwestern operating units—Puget Sound Power and Light Company and Western Public Service Company, which have suffered in recent years from municipal and Federal competition—will be offered for sale. While numerous discussions have been held with public power representatives in the Northwest, no agreement on price has yet been reached. The company has already taken preliminary steps toward consolidating its Southern properties. The Key West, Florida, properties will be sold, it is understood, and some small units in the Community Power & Light system may be acquired.

United Corporation is seeking SEC approval for an $8,000,000 investment program. While the company may not have this amount of cash at present, it wishes to be in a position to reinvest, as market conditions warrant, any funds resulting from sale of the stocks of its four subsidiaries which must be scaled down to under the 10 per cent level.

CITIES Service Power & Light Company has presented to the SEC an integration plan which, according to press reports, proposes the sale of many smaller units, while the two major systems in Ohio and Colorado will be retained and integrated. Some relinquishment of voting control over intermediate holding companies is contemplated, it is

understood. Cities Service recently sold an operating subsidiary in Michigan to Commonwealth & Southern, and it had been rumored that the Ohio properties might also go to Commonwealth, but later reports indicate that these properties—Ohio Public Service Company and Toledo Edison Company—will be set up as an integrated system.

Cities Service Company obtains only about 20 per cent of its annual system revenues from utilities, the balance being derived from oil, gas, etc. In its last annual report the company stated that, under the provisions of the Holding Company Act, "liquidation of Cities Service Power & Light may ultimately be required, or some disposition may have to be made of its (utility) subsidiaries." The report also declared that the parent company contemplated making "appropriate provisions for the readjustment or relinquishment of its present powers of control of Cities Service Power & Light and its subsidiaries." After a thorough analysis of the situation, however, officials now are reported to be more "optimistic" over the whole situation as it applies to the utility units (both holding and operating) in the system, and it was with this viewpoint that the integration plan was filed November 23rd.

ASSOCIATED Gas & Electric system, which filed its plan December 1st, was probably the only important utility to disclose full details to the press. The system proposes to integrate its properties into two major systems, one in the Middle Atlantic and the other in the South. Principally through merger or consolidation, it is proposed to eliminate 112 companies from the Associated structure, thus reducing the 172 companies now existing to 60. The entire system will contain only three utility holding companies when the program is finally effective. The changes contemplated will make necessary capital readjustment of various companies, but this will be worked out only when the integration plan has been brought to its final stages through consultation with and action by the SEC.

The Middle Atlantic system outlined in the plan includes properties located substantially in the states of New York, Pennsylvania, New Jersey, Maryland, Delaware, Virginia, and West Virginia. The company says all these properties are, with minor exceptions, either physically interconnected or capable of physical interconnection, and that they may be economically operated as a single interconnected and coördinated system. The Southern group includes public utility systems in the Carolinas, Georgia, Florida, Kentucky, and Tennessee. In addition to the two major groups there are 24 smaller properties whose combined gross revenues amount to only about 5 per cent of the Associated system total. "If it be determined they shall not remain a part of the Associated system," the plan sets forth, "the company is prepared to discuss the problem, with a view toward exchanging them for other properties or selling them for cash."

Another step toward integration is the proposal to group all but two of the system's water companies under one company, the Northeastern Water and Electric Corporation, reducing the number of water companies from 43 to 12. The Associated system desires to retain its water and transportation companies as being "reasonably incidental" to the operations of its integrated electric and gas utility systems. It is proposed that the United Coach Company own eight transportation companies, leaving only two not so owned. Two electric properties in the Philippines are retained because they are entitled to exemption. The part of Associated's plan concerned with eliminating intervening holding companies states:

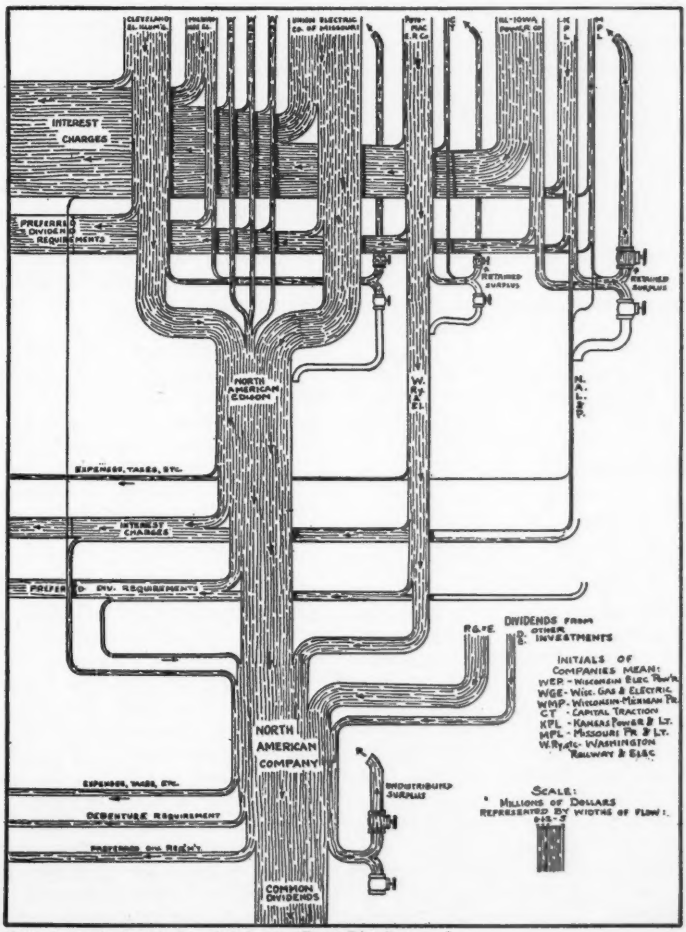
> In the Associated system at the present time, there are four holding companies which may be designated as possessing a primary character and importance. They are Associated Gas & Electric Company, its immediate subsidiary, Associated Gas & Electric Corporation, and NY PA NJ Utilities Company and Southeastern Electric & Gas Company, two subsidiaries of Associated Gas & Electric Corporation. It is proposed to combine into one corporation both the Associated and its immediate subsidiary, and to retain as subholding companies NY PA NJ Utili-

ties Company and Southeastern Electric & Gas Company, neither of which, upon completion of this plan, will have any subsidiaries which are holding companies.

Intervening holding companies to be eliminated by dissolution are Associated Electric Company, Central U. S. Utilities Company, General Gas & Electric Corporation, Eastern Power Company, Northeastern Water Companies, Inc. Nonutility subsidiaries to be disposed of or liquidated include Associated Real Properties, Inc., Loogootee Water Co. of Indiana, New Jersey and Staten Island Ferry Co. of New Jersey, Paul Smith's Hotel Company, and the Reno, Pa., Bridge Co.

COMMONWEALTH & Southern Corporation's tentative integration plan does not, according to press reports, contain any specific proposals for

INCOME FLOW CHART OF NORTH AMERICAN COMPANY



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the purchase of outside utility properties or the sale of any utility units within the Commonwealth & Southern system. A stumbling block to completion of a definite plan is the 5-year controversy with Federal agencies regarding the Tennessee valley properties. It is believed that Mr. Willkie has reiterated to the SEC the proposal already made to a congressional committee, that the SEC itself act as arbiter in fixing a fair value for Tennessee Electric Power Company (a suggestion which TVA has since rejected). If and when Commonwealth can dispose of the Southern properties, it will be able to use the funds thus obtained to round out its Northern group, which are in the contiguous states of Michigan, Ohio, and Pennsylvania. The Southern properties are already completely interconnected. The first move toward further coördination of the Northern system was the recent acquisition of certain Michigan properties from Cities Service Company.

On the problem of corporate simplification of the system there is little, if anything, to be done. There are no intermediary holding companies in the system and all of the common stock of the operating utility units is held by the parent concern. In addition, Commonwealth & Southern has filed under the Holding Company Act all required data on its nonprofit, mutual service company.

Utility Stocks Lose Half of October Rally

UTILITY stocks since November 9th have lost a substantial part of their October gains, which were attributed largely to the renewed cordial relations between the administration and leaders in the industry, and the harmony with respect to national defense and corporate integration plans. While the stock market as a whole lost some ground, the percentage drop in utilities was substantially larger than for industrial stocks.

This lack of "follow through" appears due to continued difficulties over the TVA situation. The government's armistice apparently did not extend to this battlefront. Announcement of PWA allotments for power distribution systems in eight Texas cities, together with similar loans and grants to Columbus, Mississippi, has caused renewed fears regarding the consistent pressure against private companies exerted by all Federal agencies when competition with public power projects is involved.

Meanwhile, however, the SEC program for integrating all utility systems has proceeded without a hitch, and virtually all the registered top holding companies have filed tentative plans of integration and simplification with the SEC. Chairman William O. Douglas now sees "the commencement of a real program of reconstruction on a sound basis that will give a new lease on life to the private utility industry." While the commission had hoped, Mr. Douglas asserted, "only to separate the sheep from the goats" by setting up the informal deadline of December 1, 1938, for the submission of preliminary suggestions, the industry's response exceeded all official expectations. "As it turns out, there are no goats," the SEC head remarked.

While there are 141 utility holding companies registered with the SEC, Mr. Douglas' letter of August 3rd asking for tentative plans by December 1st was addressed to only 66 top companies and replies were received from all but two, both small companies (British American Utilities Company and National Fuel Gas Company).

MR. Douglas has indicated that the commission's technical staff will examine all the plans and suggestions and will note the instances in which there is overlapping of proposed territory and potential competition for certain utility properties. A so-called master map will be prepared and each individual plan will be considered in terms of this map. Then utility executives will be called in to consult regarding special problems. Following these discussions more formal and definitive plans for each system will be prepared by the companies and these final drafts will then be submitted to the commission for regular hearings and official

approval. The whole procedure may, however, take as long as five years to carry through to completion. No appeal to the courts regarding the utility law seems to be indicated at this time.

In answer to a question regarding the effects of integration plans on the capital markets, Mr. Douglas replied in a press interview that this is "a matter of speculation." Some of the plans will involve "a lot of financing," he stated. "Nobody can predict the timing, it depends how fast the plans come along." Regarding the national defense program, he indicated that this would be "synchronized" with utility systems' rearrangements. "Details of new construction haven't been worked out," he said. He added that he thought in many instances the new construction would represent just "the normal growth of these companies."

Mr. Douglas indicated that none of the proposed plans will be made public now by the SEC, and he was quoted as doubting the advisability of such publicity until the plans are in a form on which the SEC staff and the companies are in agreement. He felt that publication would give the plans an unwarranted appearance of finality, that utility executives would be unduly alarmed if they discovered that other companies were seeking their choice properties, and that "chiselers" might try to jump in as middlemen.

New Financing

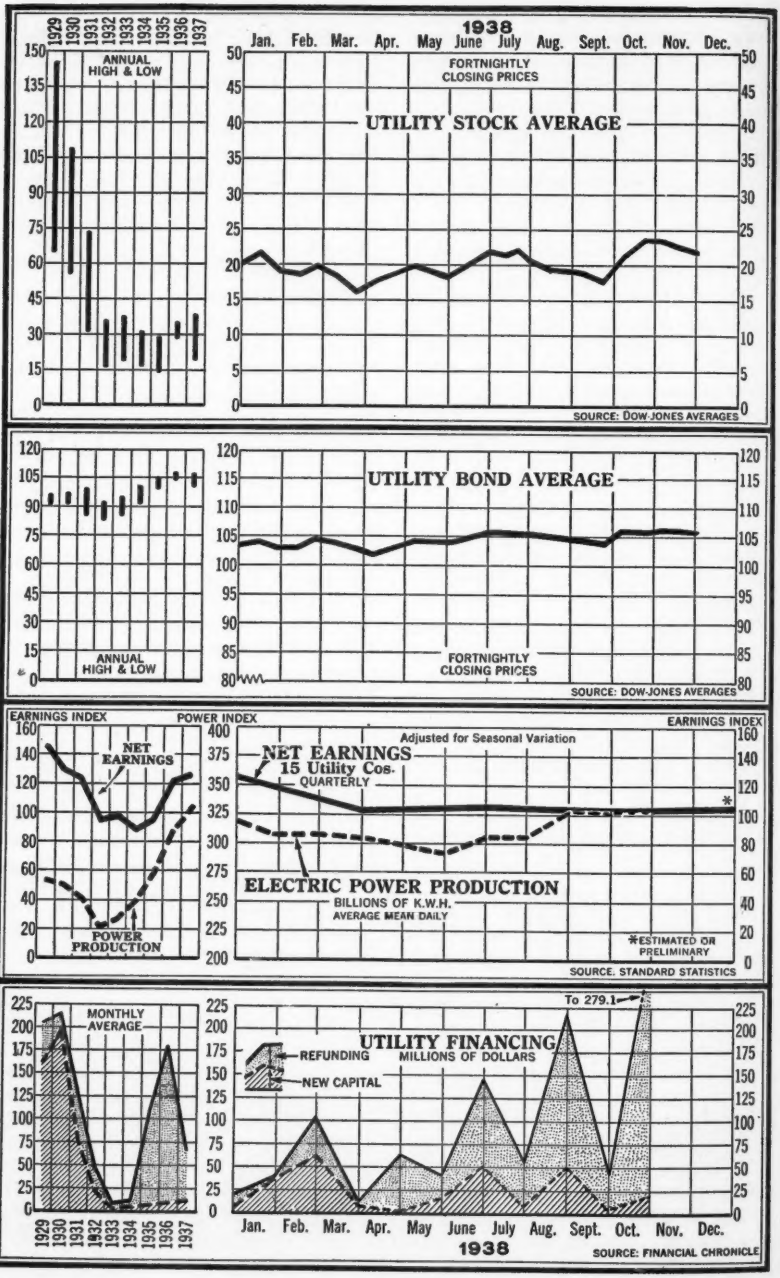
In the fortnight ended December 3rd, only two small utility bond offerings appeared—$4,000,000 Blackstone Valley Gas & Electric mortgage and collateral trust 3¼s of 1968 and $2,800,000 Michigan Associated Telephone Company first 4s of 1968. A sizeable block of preferred stock was, however, marketed November 28th by a syndicate headed by Dillon, Read & Company—130,000 shares of Union Electric Company of Missouri $5 preferred stock at 106. The newspaper advertisement of this issue was of the old-fashioned descriptive type, covering nearly half a newspaper page.

Commonwealth Edison Company is offering $25,234,800 convertible debenture 3½s of 1958 to stockholders at par, the subscription warrants having expired December 21st. Of the total issue $24,500,000 is being underwritten by a banking group consisting of 117 members. The debentures are convertible to maturity into common stock at $25 a share, which compares with the current price around 26. In a full-page press advertisement, Chairman James Simpson reviewed the system's history and refinancing program. Capitalization ratios were stated as shown below, to indicate the progress toward simplification and integration. Mr. Simpson indicated that his utility group planned capital expenditures of $75,000,000 in the next two years, of which $14,000,000 is now being raised through sale of securities.

Public Service Company of Colorado, a subsidiary of Cities Service Power & Light Company, on November 25th registered $30,000,000 first mortgage bonds due 1963, and 50,000 shares of first preferred stock. Interest and dividend rates are to be supplied by amendment.

	End of 1936	*October 31, 1938*	*Reflecting Steps Contemplated for Completion This Year*	*Reflecting Further Steps and Conversion of all Debentures*
Funded Debt	62.4%	53.4%	50.5%	46.6%
Convertible Debentures	...	11.8	15.5	...
Preferred Stock of Subsidiaries	5.7	2.0	...*	...
Minority Interests	5.9	0.4	0.4	...
Edison Common Stock	26.0	32.4	33.6	53.4
	100.0%	100.0%	100.0%	100.0%

*Assumes complete exchange of Western United preferred stock.


1929 1930 1931 1932 1933 1934 1935 1936 1937
ANNUAL HIGH & LOW
1938
Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec.
FORTNIGHTLY CLOSING PRICES
UTILITY STOCK AVERAGE
SOURCE: DOW-JONES AVERAGES
ANNUAL HIGH & LOW
UTILITY BOND AVERAGE
FORTNIGHTLY CLOSING PRICES
SOURCE: DOW-JONES AVERAGES
EARNINGS INDEX
POWER INDEX
NET EARNINGS
POWER PRODUCTION
Adjusted for Seasonal Variation
NET EARNINGS
15 Utility Cos.
QUARTERLY
ELECTRIC POWER PRODUCTION
BILLIONS OF K.W.H.
AVERAGE MEAN DAILY
*ESTIMATED OR PRELIMINARY
SOURCE: STANDARD STATISTICS
MONTHLY AVERAGE
To 279.1
UTILITY FINANCING
REFUNDING
NEW CAPITAL
MILLIONS OF DOLLARS
1938
SOURCE: FINANCIAL CHRONICLE

What Others Think

Highlights of the TVA Investigation

Digest of testimony and other developments connected with the joint congressional committee's investigation of the Tennessee Valley Authority, conducted at Washington, D. C., on November 15th through November 26th, 1938, embracing the presentation of the case for private utility companies

STARTING in Washington, D. C., on November 15th, following a recess of two and one-half months since the joint congressional committee closed its hearings at Knoxville, Tenn., the first witness on behalf of the utilities was Dean Edward L. Moreland of the engineering department of the Massachusetts Institute of Technology, and senior member of the firm of Jackson & Moreland of Boston. Dean Moreland told the congressional committee:

> If TVA is allowed to continue its program and market its power to municipal and coöperative distribution systems, it will develop into a gigantic enterprise requiring, in addition to the $510,000,000 expended for generating facilities, some $120,000,000 for transmission lines, general equipment, and other facilities to carry this power to the municipalities, excluding the cost of the distribution systems required by the municipalities and coöperatives.
>
> Even upon the assumption that this tremendous power output could be marketed completely at the TVA rates, the out-of-pocket annual expense of approximately $34,500,000 would exceed the annual revenue of $24,150,000 by not less than $10,000,000 per year, or approximately 43 per cent. If a private utility had developed and owned these same facilities and sold power at TVA rates, after bearing normal interest and tax burdens, there would have been a deficit of $21,000,000, amounting to 87 per cent of the TVA rates.

Dean Moreland was interrupted occasionally by the counsel for the committee, Mr. Biddle, Senator Brown of New Hampshire, and Senator Schwartz of Wyoming, all Democrats, who challenged his figures and suggested that he was biased as a "company expert." He was defended by Representative Wolverton, Republican of New Jersey.

The witness admitted that he was appearing at the request of Mr. Willkie and also that he had testified as an expert for the utilities in the trial of the suit of eighteen utility companies against the TVA last year at Chattanooga, Tenn. Dean Moreland insisted that he was presenting an "independent" viewpoint rather than that of the Commonwealth & Southern.

THE witness said he was primarily a utility engineer, had sometimes represented public utility commissions, and was chairman of the Municipal Light Commission in his home town of Wellesley, Mass.

"The companies pay you to deliver evidence along their line and if you don't deliver, somebody else gets the job; isn't that right?" asked Senator Brown.

"That applies to politics, too," interjected Representative Wolverton, apparently alluding to Senator Brown's recent defeat for reëlection.

Dean Moreland protested that it was "unfair" to imply that he was merely a "yes-man." He said that he presented the facts as he saw them regardless of whether they fitted in with the view of the companies. In this case, he said, he agreed with their view. Sometimes he

did not, and then he did not appear as a witness.

He testified that the TVA yardstick rates had been misunderstood by the public as meaning that company rates were excessive or that the companies were inefficient because their rates were higher than TVA's. If the yardstick was to be used as a direct comparison with company rates, it should include all elements of cost paid by the companies.

He emphasized that TVA could use government money at 3½ per cent interest, whereas the companies had to pay 6 per cent interest. Mr. Biddle asked whether his figures were not too high in both cases, in view of TVA reports showing that the cost of its money averaged under 3 per cent last year and SEC reports showing utility companies paid an average of 4.57 per cent on bonds and 6.20 per cent on preferred stock last year.

DEAN Moreland replied that he was using "reasonable" interest charges for normal long-range financing instead of charges under the present "distressed" conditions of the money market.

The companies also had to meet the costs of selling their securities, which, Representative Wolverton pointed out, "would be eliminated if the government raised your money for you."

The witness admitted that whether the public was not entitled to the savings in rates which the government could accomplish by the "natural advantage" enjoyed in financing was a fair question, but added that the same principle could be applied to other industries. He raised the point, "how far are we going to extend the government use of capital" in competition with private enterprise. He conceded also that the companies might have a "natural advantage" in the higher wages paid by TVA and that this factor should be taken into consideration in any comparison of rates.

Dean Moreland also emphasized that private utilities must pay materially higher taxes than the 5 per cent of TVA's gross revenues which the TVA Act provides should be paid in lieu of taxes to the state governments where it operates. When Mr. Biddle interjected that Mr. Lilienthal's testimony showed that 12½ per cent instead of 5 had been set aside in lieu of taxes in fixing the yardstick rate, the witness replied that his estimates were based on the situation which will exist when all eleven proposed TVA dams are completed, operating at full capacity, and selling their full power production, rather than on the present system with three dams operating for power purposes.

"I HAVE tried to be perfectly fair to the TVA," he said, "but the fact remains that to the extent that taxes paid by the TVA are less than would have been paid by private utilities, the taxpaying public will have to make up the deficit somehow or other."

"Don't you know," demanded Senator Brown, "that the utilities keep two sets of books—one they pay taxes on and one they don't?"

"I never heard of it," was the reply.

"Two sets of books have become very popular in recent times," said Representative Wolverton in an apparent allusion to New Deal accounting methods.

Dean Moreland asserted it was unfair to compare taxed company rates with untaxed government rates and say, "Ah ha! The utility is gypping us."

Senator Schwartz said that taxes paid by utilities are passed on to consumers anyway.

"Yes," replied the witness, "and as far as local taxes are concerned it might be said it's up to the local public to decide whether they want to pay higher taxes or higher rates, but it's different with Federal taxes that fall on all the rest of the country.

"If Tennessee is satisfied with losing taxes on the private utility business within the state, the rest of the country is not concerned, but it is concerned over the loss of Federal taxes on private industry. Furthermore, the utilities of the rest of the country suffer from having Tennessee rates quoted without the public realizing that the tax differential accounts for lower TVA rates."

DEAN Moreland said another "great differential" lay in the advantage gained in allocating the costs of TVA dams. Allocation by the TVA to power of $49,360,000, or 52 per cent of the $94,125,000 total costs charged against it for Norris, Wilson, and Wheeler dams, and the rest to navigation and flood control, meant that TVA had to pay only one-third the interest at the government rate of 3½ per cent; that the companies would have had to pay at 6 per cent if they had built the same three dams solely for power purposes at a total cost which he estimated would have been $87,000,000.

When company dams were built in the TVA area the companies had to pay the full costs, without any subsidy from the government for incidental flood control and navigation benefits, except for the cost of actual navigation locks paid for by the War Department.

Dean Moreland said the direct expenditures on flood control and navigation at Norris, Wilson, and Wheeler dams were only $6,676,000. By direct expenditures, he meant items that could have been omitted entirely without affecting power development.

A proper division of costs for the TVA yardstick base should have allocated 67 per cent to power instead of 52 per cent. He said he had reached this figure by deducting estimated costs of dams built solely for navigation, and dams built solely for flood control, from the total cost of TVA dams, without making any survey of his own. These estimates were made by Ford Kurtz, flood control expert of the J. G. White Company, and Major Rufus W. Putnam, navigation expert, formerly of the United States Army Engineers, who testified for the companies in the Chattanooga lawsuit. He also stated that the systems on which Mr. Kurtz and Major Putnam based their estimates were not the systems used by TVA in building its dams, and that the companies would not have built dams at the same sites used by TVA.

THE witness asserted that the TVA yardstick failed to include other "true elements of cost," as the government agency was not held to the same accounting methods as the companies, and as it did not have to pay interest during construction, operating losses during the period of initial operation, gasoline taxes, registration fees, and normal rates for freight, telephone, and telegraph service as paid by private business.

Surgeon General Parran, of the United States Public Health Service, testified that TVA had done an excellent job in its public health work in coöperation with Federal and state health agencies, especially in malaria control in reservoir areas. He said TVA would have been "derelict in its duty" if it had done less, and would be warranted in taking even greater activity along these lines.

Questioned by Representative Wolverton and Representative Thomas A. Jenkins, Republican, of Ohio, as to whether TVA was justified in spending so much money, $575,000 last year, on public health in one section of the country, when other sections were in need of similar help, Dr. Parran termed the South "the nation's No. 1 health problem," as President Roosevelt recently called it the "nation's No. 1 economic problem," because it had the fewest physicians, the fewest hospitals, and the highest death rate per capita in the country.

Representative John Sparkman of Alabama appeared before the committee in protest against the alleged failure of TVA to maintain its principal offices at Muscle Shoals as directed in the TVA Act.

Representatives Wolverton and Jenkins protested against the acceptance of written statements by five TVA department heads describing their work, but Chairman Donahey, Democratic Senator from Ohio, admitted the statements on the understanding that any committee member could call the department heads for questioning later.

ON November 16th Dean Moreland continued his testimony to the effect that the highest possible gross annual revenues from the sale of electric power by TVA when completed and operated at full capacity (probably sometime after

1946) would be about $24,150,000. He used the TVA's own rates and TVA's official reports to Congress on production capacity and took estimates on allocation of costs from other Commonwealth & Southern experts, Ford Kurtz of the J. G. White Company, flood control expert, and Major Rufus W. Putnam, formerly of the United States Army Corps of Engineers, navigation expert.

According to Dean Moreland, the TVA reports showed that by the time the entire proposed 11-dam system was completed, fully loaded, and operating at capacity, it would have 1,922,000 kilowatts of installed generating capacity, which theoretically could produce 10,000,000,000 kilowatt hours of electrical energy a year, of which 8,000,000,000 would be available for delivery in practical operation, and 7,303,700,000 would actually be salable after allowing for losses of power in transmission.

The witness said that 4,664,200,000 kilowatt hours would be so-called firm or primary power, most valuable because available for sale at all times; 2,289,500,000 would be secondary power, unavailable at periods when it was necessary to hold back large quantities of water for flood control purposes; and 350,000,000 would be in another category known as dump power.

Mr. Biddle challenged Dean Moreland's computations. The witness conceded that a deduction of 35,200 kilowatts of installed generating capacity he had made from the potential TVA source of salable firm power was based on Mr. Kurtz's estimate of the need for flood control storage, which, in turn, was based on drought conditions.

DEAN Moreland insisted that the estimate was justified on the ground that TVA could not count on selling any more power than would be available in the worst dry year and at the same time fulfill its duty of properly protecting life and property in the valley states from the danger of floods. He added that the loss of $1,300,000 revenue from sale of firm power which this item represented in his estimates of TVA earnings would be largely offset by the fact that the power taken from the "firm" category could be sold as secondary power except during flood periods.

Mr. Biddle brought out that the TVA had steam plants which could make up for the loss of firm power on account of flood control, but Dean Moreland replied that the TVA rejoinder in the 18-company suit at Chattanooga had declared the authority did not intend to use steam plants at any time in the future.

Representative Wolverton, Republican, of New Jersey, remarked that if TVA used steam plants, it would tacitly admit that it was engaged in power production as its principal function, whereas it is contending in the 18-company suit, on appeal at this writing before the U. S. Supreme Court, that its activities are constitutional because power is only incidental to its primary functions of flood control and navigation improvement on the Tennessee river and its tributaries.

A clash developed between Messrs. Wolverton and Biddle when the Representative protested at the failure of counsel to provide committee members with copies of the committee's report on the yardstick and related subjects, made by its engineering staff, headed by Thomas A. Panter, before calling company experts to testify.

"If we had Mr. Panter's report here now to compare with Dean Moreland's and the TVA report," Mr. Wolverton went on, "we would know to which to give credibility."

Chairman Donahey ended the argument by announcing that Mr. Panter would be in Washington November 21st and that Dean Moreland had asked to testify as a company expert.

DEAN Moreland then submitted his estimates of TVA revenues based on annual sale of 7,303,700,000 kilowatt hours, showing $15,731,700 to be received from general business, including sales to municipalities and coöperatives; $8,054,175 from sales to large industrial and utility companies in the valley; and $350,000 from the sale of dump power.

The largest estimated revenues from individual customers were $1,493,170 from the Aluminum Company of America, $1,017,400 from the Monsanto Chemical Corporation, and $894,750 from the Arkansas Power & Light Company. The total revenues, the witness said, represented a wholesale average rate of 3.3 mills a kilowatt hour.

Representative Jenkins, Republican, of Ohio, asked if some of the industrial customers of TVA had received better rates than others. Dean Moreland objected to the question, saying it implied that "something improper or unfair" had been done, whereas different contracts provided for the sale of different amounts of power under different conditions.

"Did you discover any evidence of unfairness in any of these contracts you examined?" asked Representative Barden, North Carolina Democrat.

"I will broaden the answer and say I have not discovered any evidence of unfairness in these or any other TVA contracts I have looked into," replied the witness.

At the close of the November 15th session Dean Moreland had just begun to attack the TVA allocation of costs. Using an estimate by Major Putnam for the cost of a system of thirty-two low dams for navigation only, instead of the proposed eleven TVA multiple-purpose high dams, he said only $91,809,000 should be allocated to navigation in the division of total TVA costs instead of the $150,000,000 TVA estimate of the cost of an independent navigation-dam system.

He quoted Major Putnam, now a consulting engineer on inland waterways navigation and an operator of barge lines, as saying that an expenditure of $150,000,000 on navigation would not be justified by present or potential traffic on the Tennessee river.

It was on November 16th that it became known that Dr. Arthur E. Morgan, who was deposed by President Roosevelt as chairman and member of the TVA board, had asked the committee to let him testify regarding an independent study of the yardstick which he had caused power experts to make in valley communities where municipalities and rural coöperatives are selling TVA power at cheap retail rates.

On November 17th Dean Moreland continued his testimony on TVA operations and pointed to a conclusion that the TVA power program will cost the taxpayers in the United States $10,350,000 a year to meet the deficit that will result when the proposed 11-dam system is completed and in full operation under the yardstick rates. He added that TVA's annual deficit would amount to $20,999,000 if it had to pay taxes, interest, and other costs which utility companies would ordinarily have to pay under similar circumstances. Dean Moreland then stated that it would be necessary for TVA to increase yardstick rates 43 per cent in order to enable the government and the taxpayers to "break even." Private companies under similar circumstances would have to charge 87 per cent more than TVA rates to break even.

The engineer's figures at once were attacked by the committee's counsel, Mr. Biddle, as too favorable to private utilities, while Representative Charles A. Wolverton pointed out Moreland had not made allowance for services the TVA enjoyed from other government departments.

Moreland admitted on questioning by Biddle, that if TVA can get money at 2.7 per cent "it would show a profit." Moreland had estimated TVA's interest will cost it 3½ per cent, a figure once used by Director David E. Lilienthal. Biddle had produced a letter from the Treasury Department in which the rates at which the government borrowed money were given in a range from 2.2 to 2.7 per cent.

It has been pointed out, however, that although the government can borrow money more cheaply than private concerns, the taxpayer eventually makes up the difference.

Biddle also criticized Moreland for not deducting from his depreciation figures some $75,000,000 of land owned

by TVA which is nondepreciable. Moreland replied the land inundated and taken out of tax stream would just about balance this.

QUESTIONED by Wolverton, Moreland said he had not included in his tabulation the services rendered to TVA by other governmental departments; the comptroller, the Treasury Department's services in financing bonds, registration and so forth, use of government credit, and other departments, although home services performed by the Army had been included.

Introduced in an exhibit, but not discussed before the committee, was a statement in the report of C. H. Garity, director of purchases and materials, that TVA has saved $1,282,000 by using government bills of lading, government freight rates, and other subsidies enjoyed because of TVA's Federal status.

Considerable was made by Biddle of his point that if Moreland's figures either on interest or depreciation charges were nine-tenths of one per cent too high that TVA "would break even."

Moreland's final tabulation, based on part of TVA's figures and in part on his own "judgment," relied on the "increment theory"; that is, that all expenditures not now allocable to flood control and navigation should be allocated to power. Director Lilienthal's "incremental" theory is more or less the other way around, that only items directly chargeable to power should be allocated to power and that roughly the balance should be laid to navigation and flood control.

Two columns of figures were used by Moreland: One gave the investment in the 11-dam system and the other the annual cost.

The "total estimated investment subject to interest and sinking-fund depreciation" of the 11-dam system, Moreland gave as $510,082,527.

Then he deducted for the town of Norris, parks, forest lands, and so forth, $4,843,000.

He deducted for navigation and flood control—$172,942,600. The $172,942,600 was broken into two items, $91,809,000 for a low dam Tennessee river navigation system as prepared by Major Rufus Putnam, and $81,133,600 for a system of flood control dams on the Tennessee's tributaries as prepared by Engineer Ford Kurtz. Moreland emphasized that flood control dams should be on the tributaries to be most effective.

MORELAND termed the TVA flood control program "very inferior" to a real flood control system. Biddle asked for amplification of the flood control criticism.

"The people of Chattanooga (Tenn.) have been lulled into a false feeling of security from floods by TVA," Moreland replied, adding that TVA dams and reservoirs would not prevent, or handle, a "major flood" when dams and reservoirs were filled.

This brought an abrupt denial from Biddle and two Democratic committee members, Representatives Barden (D.-N.C.) and Thomason (D.-Tex.).

They said Moreland's arguments on navigation and flood control had been refuted by a 3-judge Federal circuit court in a decision now before the Supreme Court on appeal.

Moreland then used the result of these deductions, $332,296,927 as the "increment investment" for power, and applied to it 5 per cent for interest during construction, 3½ per cent for interest on increment investment, 1.94 for depreciation on power houses and power facilities on a 30-year life basis on $139,120,000, and 0.763 on the remaining increment investment, $209,791,733, and on the 50-year life basis.

Still mowing away at the $332,296,927, Moreland gave transmission investment $85,863,000 with interest on this 3½ per cent, depreciation at 2.57 per cent, and operation and maintenance at 2.48 per cent; working capital and general investment estimated at $16,543,000, figuring interest on this at 3½ per cent and depreciation on general equipment at 2.14 per cent.

INCLUDED in annual costs were $150,000 for commercial and electrical de-

velopment, $1,000,000 for general administrative expense, and the 5 per cent tax which TVA must pay to Tennessee and Alabama on its gross revenues, at $1,193,000. Finally he estimated the "taxes lost" by government operation, not including the 3 per cent Federal excise tax at a net of $6,313,000.

Moreland's final figures were:

Total out-of-pocket increment yearly cost for power $34,488,000.
Annual TVA revenue from sale of power, $24,136,000.
Annual out-of-pocket deficit, $10,352,000.

A sharp difference in the allocation theories of Moreland and the TVA is shown by comparative figures. The following are those submitted by Moreland on the 11-dam system:

	Amount	*Per Cent*
Flood control	$81,133,600	15.9
Navigation	91,800,000	18
Power	332,296,927	65.2

In this table it should be noted nine-tenths of one per cent appears lost. This because Moreland did not consider forests and parks as properly allocable to any of the three items.

The figures of the TVA allocation committee, in its report made to the President last June, on Wheeler, Wilson, and Norris dams follow:

	Amount	*Per Cent*
Flood control	$18,470,627	20
Navigation	26,294,865	28
Power	49,360,179	52

In total cost of dams, a difference appears also:

	Moreland	*TVA Allocation Report*
Wilson	$42,300,000	$30,120,009
Norris	36,361,738	31,532,120
Wheeler	44,449,403	32,473,542

With respect to Wilson, of course, Moreland used a figure more nearly that of the actual investment by the government; TVA the depreciated valuation at which it took over the war-time-built Muscle Shoals plant in 1933.

BIDDLE chided Moreland because the engineer had once made a $20,000,000 mistake in his calculations prepared for the utilities in the Chattanooga trial last fall. The estimates were submitted in an exhibit but excluded pending appeal. Moreland, Biddle said, had twice included $20,000,000 for step-up stations.

Chairman Vic Donahey permitted Moreland to make his statement in connection with the final tabulation without interruption from Biddle.

On November 18th Dean Moreland completed his testimony with a critical analysis of TVA retail rates and concluded that the TVA yardstick, both in its wholesale and retail, was an unfair standard to measure the reasonableness of private utility company rates. He said:

> Each operating utility company produces and sells power under conditions affecting each company, and not on a yardstick. The public should understand just what is and is not included in the TVA rate base, and a proper correction should be made before attempting to bring the pressure of public opinion to bear on utility rates.

DEAN Moreland said that although his calculations on TVA costs, revenues, and deficits during his four days on the stand dealt almost exclusively with TVA wholesale rates, similar criticism applied to the retail rates which TVA prescribes for the resale of its power by municipalities and rural cooperatives. He said that municipalities using TVA power enjoyed grants of Federal money without interest charges and Federal loans at low interest rates, the cost of which the taxpayers have to pay.

"Therefore," he added, "the retail rates are not fair as direct comparison with utility rates, unless allowance is made for their ultimate cost to the taxpayers, any more than the TVA wholesale rates—the so-called yardstick—are fair unless similar allowances are made.

"It is especially unfair for public money to be used in grants and loans to municipalities for duplicating systems to destroy existing utilities."

"Considering the changing cycles of society," Chairman Donahey asked, "do you believe that any plan can be devised to measure accurately the value of power?"

"I do not believe any rigid formula can be laid down that would be applicable to all conditions," replied the witness, "but competent people can make an analysis of operating conditions that will accurately measure the value of power produced at a given time and place."

ON the same day the committee heard the testimony of C. W. Kellogg, president of the Edison Electric Institute and chairman of the board of Engineers Public Service Company of New York, a Stone & Webster unit. The committee session was concluded before Mr. Kellogg had an opportunity to develop his ideas very fully, but in a statement outlining Mr. Kellogg's proposed testimony, which was released by the Edison Electric Institute at that time, there appeared the following summary:

1) A private company desiring to develop electric power on a navigable stream must, under the Federal Water Power Act, at its own expense pay for the full cost of navigation improvement except only the lock itself, or in any event gets no refund from the government nor from anybody else for the value of the general improvement it makes to navigation. (TVA disregards for power purposes a large part of its actual investment in dams by allocating a large part to navigation.)

2) A private company must pay interest and taxes during construction and (where some time is required to load up the plant) preliminary losses in operation. (TVA pays none of these, although its entire investment is represented by interest-bearing debt of the nation and all taxes not paid by it must be added to the tax burden of others.)

3) A private company must pay interest charges on all of its investment cost as above stated, and provide for depreciation of its investment over a term of years. (TVA pays, or so far in its published earnings statements has charged itself with, none of these.)

4) With four of the most important such private investments in navigable streams, charges (interest, depreciation, and taxes on investment) comprise 92 per cent of the cost of producing hydro power. (TVA charges itself nothing for the first two of these and a merely nominal amount for taxes.) Is this a fair or factual yardstick?

Mr. Kellogg's statement also contained an interesting comparison of the relative costs of hydroelectricity and steam generated electricity, summarized as follows:

When the Keokuk dam on the Mississippi river was being projected in 1907, the average coal consumed to produce a kilowatt hour of electricity country-wide was 5.4 pounds. Ten years later it was 3.3 pounds and today a modern steam-power station of 100,000 kilowatt capacity, using West Virginia coal, and operating at 60 per cent annual load factor, can produce a kilowatt hour from 0.86 pounds of coal—less than one-sixth of the amount required on the average a generation ago.

With this condition known and with wide experience with operation of steam plants to rely on, it can be shown that today no hydro plant in the Tennessee valley is economically justified if it costs more than $201 per kilowatt of continuous capacity, compared with the $553 per kilowatt the system will actually cost. . . . The assumptions represent well-established present practice. The cost of steam generating equipment per kilowatt has declined in the past decade, while hydro-generating equipment has advanced 15 to 20 per cent in that period.

ON November 20th the committee's counsel, Mr. Biddle, announced that he had declined an offer of Wendell L. Willkie, president of Commonwealth & Southern Corporation, to open his income tax returns, bank accounts, and other financial records to inspection by the committee.

The offer was made by Mr. Willkie after President Roosevelt signed an executive order giving the committee authority to inspect income tax returns of individuals and corporations in its study of negotiations between TVA and Commonwealth & Southern for the sale of Tennessee Electric Power Company to the former.

In announcing rejection of offers made by the utility company president, Biddle explained that neither he nor the committee wished to examine the private affairs of Mr. Willkie. The committee counsel added that his action was an example of the restraint the committee would use in exercising discretionary power vested in it under the President's order.

Disclaiming any intention of inspecting the depreciation claimed by Tennessee Electric Power in its tax returns, Mr. Biddle said that was all he had asked in requesting the President for the order. He said that this information was sought

because of the dispute between Mr. Willkie and David E. Lilienthal, TVA power director, as to the proper allowance to be made for depreciation in arriving at a fair price for Tennessee Electric Power properties.

Representatives Wolverton, of New Jersey, and Jenkins, of Ohio, House Republicans on the investigating committee, expressed belief that it was unlikely the committee would use the authority provided under the President's order to harass opponents of the TVA power program. Both members had previously attacked the executive order as "too broad," holding that the committee counsel could have obtained the depreciation statistics without the authority to examine any and all tax returns in full.

THOMAS P. Cooper, dean, agricultural department, University of Kentucky, and chairman of the coördinating committee through which valley states, land grant colleges coöperate with TVA and other Federal agencies in their farm program, consumed the major portion of the day's session explaining benefits of TVA fertilizer experiments to farmers in the so-called Tennessee valley states.

Approving action of TVA in deciding to develop highly concentrated phosphate fertilizers instead of nitrate fertilizers as originally contemplated for the Muscle Shoals plant, the witness said that production of cheap superphosphate fertilizers was vital to the fertility of farm lands throughout the country. He added that the land grant college committee and other agricultural experts had made such recommendations to TVA before it began its fertilizer production program.

On November 21st the committee heard further from representatives of the American Farm Bureau Federation, which claimed to speak for one million and a half farm people. The president of the Federation, Edward A. O'Neal, stated in a brief that the TVA fertilizer program carries out "the basic objectives of the American Farm Bureau Federation with respect to this project." The brief further stated:

> The practical results from the TVA fertilizer program to date, as measured by the study made by the American Farm Bureau Federation, the study made by the special committee of the land grant colleges, and as evidenced from the records of practical trial by farmers, justify the continuance and expansion of this program until thorough tests and demonstrations have been made for all types of soils and conditions in all sections of the United States in order to prepare the way for restoration and maintenance of soil fertility.

MR. O'Neal's brief urged an increase in the number of farmers receiving experimental fertilizer material and added that more time would be necessary to reach an accurate appraisal of the value of the program. The selection of phosphate for major emphasis in TVA fertilizing was approved as in the national interest because, it was said, "the development of highly concentrated phosphate by the TVA is essential to the success of a national program of soil conservation."

Mr. O'Neal's brief denied that the TVA fertilizer program had injured the commercial fertilizing industry but asserted that it would benefit the industry in the long run by creating new demand for phosphate in quantities far beyond previous demands of such concentrated plant food. The brief urged the continuation of the present program of distributing TVA concentrated phosphate for soil conservation payments by the AAA. This policy was said to be a means of acquainting farmers with the use of concentrated plant food material and promoting national soil conservation.

On November 22nd the committee heard further from C. W. Kellogg who attacked TVA cost allocations. He said that private companies building such dams as Norris, Wheeler, and Wilson would have had to value them under proper cost accounting methods at approximately $161,040,000, as compared with the $97,690,434 given as the total cost of these dams by the TVA. Mr. Kellogg also asserted that in allocating only 52 per cent of the cost of these dams to power, TVA was "whittling down" the cost to the taxpayer of these projects

to an unfair amount as compared with what private companies would have to do under similar circumstances.

The witness pointed out that privately owned hydroelectric properties show over 90 per cent of total cost as consisting of return on investment, depreciation, and taxes. In comparison, he claimed that TVA has charged nothing for either interest or depreciation in its statements of operation and made only a nominal charge of one-tenth of one per cent for taxes. He disputed the validity of TVA's contention that it should charge no interest because it pays none, in view of the fact that the cost of the entire TVA program has become part of the tax obligation constituted by the Federal debt.

COMPARED with alleged TVA cost of 6.33 mills per kilowatt hour to produce power in 1937, Mr. Kellogg claimed that the authority could only average between 3½ to 3¾ mills per kilowatt hour gross earnings on the basis of yardstick rates if proper accounting methods were used. The low retail rates which Mr. Kellogg said TVA prescribed for municipalities and rural coöperatives to which it sells power at wholesale were "far below what private companies require to pay their costs." He cited figures from Tupelo, Miss., which uses TVA power, and Las Cruces, N. M., which is supplied by one of the companies in his system, in an attack on the TVA contention that its cheap rates greatly increased consumption and thereby made the low rates remunerative on the basis of volume sales. He added:

> Each company purchases its entire energy supply, yet in spite of Las Cruces buying fuel-produced, unsubsidized energy, and Tupelo buying heavily subsidized hydro energy, the difference in power cost per kilowatt hour is but 44 per cent, or 0.23 cents. The big differences come in other operating expenses, where Las Cruces, with the most careful economy, is 3⅓ times as high as reported by Tupelo, and in taxes and depreciation 2¼ times as high. The former difference is due to the things done for Tupelo by TVA and the latter to failure to include items the private company must pay.
>
> The same subsidy appears in the Tupelo plant investment, which is less than a third of the national average investment per kilowatt for distribution systems only. The difference was obviously furnished by TVA or by a depreciated purchase price produced by its competition.

WITH respect to the trend in utility rates for domestic electricity, Mr. Kellogg testified that national average cost per kilowatt hour had decreased from 6.8 cents in 1927 to 5.30 cents in 1934 (when TVA operations began), and 4.29 cents in 1938. From this he concluded that the downward trend was approximately the same before as after TVA operation, although Democratic members of the committee seemed to disagree on this point, taking the view that TVA yardstick and other actual or potential government competition had forced rates down.

It was during this session that Senator-elect Mead (Democrat of New York) charged that the private utility companies were conducting an "unfair and unsportsmanlike" campaign against TVA. He charged that private companies are sending out literature which misrepresents TVA and does not give a true picture of the economic foundations of the government power project.

Mead said testimony by TVA Director David Lilienthal showed that TVA in fixing its rates computes the charges which private utilities pay for taxes, interest, and a number of other costs. Private firms, he said, are spreading the impression that these factors were not included in fixing the TVA rates.

On November 23rd, the committee heard Wendell L. Willkie, principal spokesman for the private electric industry, declare that the Federal combination of TVA and PWA was virtually unbeatable and "threatens to destroy private utility companies."

Where private producers of electricity refuse to hand over their territory to the government on terms satisfactory to the TVA, he asserted, the PWA steps in and provides the money for duplicating systems—45 per cent in outright gifts and 55 per cent by loans.

"In effect," he said, "the government holds a gun to the head of the utility and

says, 'Sell at our prices or we will duplicate.'

"No private utility can meet this subsidized competition."

MR. Willkie, who is president of The Commonwealth & Southern Corporation, a large operator in the area of the TVA experiment, registered his protest with the special Senate-House committee investigating TVA operations.

It was a lively session. The loudspeaker paraphernalia with which the hearing room is equipped was quite unnecessary for the proceedings. Neither Mr. Willkie nor his chief interrogator, Mr. Biddle, needed any mechanical aids in order to be heard in the farthest corners of the room.

Once when Mr. Biddle suggested that Mr. Willkie "just answer the questions" and "leave out the stump speeches," the witness retorted:

"Then you just ask questions and you will get along all right. You've been making speeches, too. It's hard to answer these questions without some indignation."

On another occasion, when Mr. Willkie used the terms "TVA" and "the United States government" interchangeably, Mr. Biddle observed:

"Are the TVA and the government of the United States the same thing, Mr. Willkie?"

"Well, aren't they?" the witness shot back. "Sometimes it looks like it, the way the TVA rides ruthlessly. . . ."

In another exchange Mr. Willkie declared TVA efforts to buy existing properties at low prices on threats of bringing in duplicating systems through generosity of the PWA constituted "one of the most cruel, brutal, un-American doctrines ever adopted."

Mr. Willkie's company currently is engaged in negotiations with the TVA for sale of a subsidiary, the Tennessee Electric Power Company, to the TVA. The negotiations are deadlocked by a dispute over the sum that should be allowed for depreciation of the system.

Expressing doubt that he and David Lilienthal, negotiator for the TVA, ever would be able to get together in the dispute, Mr. Willkie proposed that the issue be put up to the Securities and Exchange Commission for settlement.

"If you can persuade the TVA at this time to do likewise, I publicly agree to abide by the valuation which the Securities and Exchange Commission may finally set on our properties," he declared.

Willkie said he also would agree to arbitration of the dispute by "some fair tribunal" or settlement through condemnation proceedings. He declared, however, he would not "sell at a price contrived solely to make the 'yardstick' work."

Mr. Willkie challenged the committee's authority to go into the company valuation at all, and said if it did so he would want—first he said one week, later he asked for two weeks—ample time in which to present his side of the matter.

"The determination of property values," he explained, "is a laborious and exacting task. Your committee would be the last to claim, I am sure, that it is a body of experts on valuation. If your committee attempts to turn itself into an informal valuation body it will simply become a forum for a continuation of the already long debate on this question."

There was no expression from the committee as to whether it would or would not go into the valuation controversy—so the debate proceeded.

MR. Willkie said he was insisting that TVA pay his company what it would cost to reproduce the Tennessee Electric Power Company system, less depreciation, or what it cost the investors to put it there. He said he did not care which formula was followed, but the matter ought to be decided by some "fair tribunal." Neither he nor Mr. Lilienthal could possibly be nonpartisan in the controversy, he asserted.

"There's more to this matter than just the case of the Tennessee Electric Power Company," he continued. "There are some $12,000,000,000 to $15,000,000,000 invested in the private utility business. Suppose the government decides to take

all of these systems over. There ought to be some formula of valuation that will be uniform in its application. Either that or there should be a plan of arbitration—or condemnation."

Mr. Willkie said one suggestion for a "fair tribunal" envisioned a 3-member commission of which one member would be nominated by his company, one by TVA, and the third by the Supreme Court.

"Was that your suggestion?" Mr. Biddle asked.

"No," replied Mr. Willkie.

"Was it Mr. Lilienthal's?"

"No, I think Mr. Thomas Corcoran or Mr. Jerome Frank suggested that."

Mr. Willkie said his own suggestion was a 3-member commission composed of Professor Felix Frankfurter, of Harvard University; Clarence A. Dykstra, president of the University of Wisconsin; and Karl T. Compton, president of the Massachusetts Institute of Technology.

WHEN Mr. Biddle suggested Mr. Lilienthal had opposed the arbitration proposal because he did not believe TVA had authority to delegate arbitration powers to some other body, Mr. Willkie commented:

"I have understood all along that Mr. Lilienthal took a position of opposition to arbitration because then he might lose his power to bring the PWA in to duplicate us."

Mr. Willkie's answers caused Mr. Biddle to remark at one stage:

"If you would just wait for me to finish my question, Mr. Willkie. You are so quick on the trigger."

"Yes," Willkie agreed, "that is because I've gone through all this so often before they told you about it."

Mr. Willkie told the committee at the outset of his testimony that the private utility industry needed to spend some $2,000,000,000 for purposes of expansion and for balancing of capital structures, but was unable to do so because investors would not put up this much money.

"The investor," he explained, "is afraid of what the government intends to do with the utilities. He will remain afraid as long as the basic problem of subsidized Federal competition is unsolved."

The witness also expressed the view that the government either ought to abandon its power enterprises and confine itself to flood control, navigation, and soil conservation, or sell its power to private utilities at the switchboard, to be distributed by the private companies at retail under Federal and state regulation.

Mr. Willkie read his prepared statement to the committee without interruption. Thereafter, however, he withstood two and one-half hours of cross-examination by Mr. Biddle and the committee members, during which he did not make any material change in his original testimony.

THE principal import of Mr. Willkie's prepared statement, in addition to his recommendation for purchase price arbitration by the SEC, stressed his contention that some such solution to the impasse between the administration and the private utilities would be necessary to break the "log jam" in the industry which has impeded recovery for the last five years. Mr. Willkie quoted the former chairman as saying the private electric utilities should spend a billion and a half annually for the next five years, but they cannot raise money to do this, he argued, because investors have been frightened by subsidized government competition.

Apparently anticipating an attempt by Mr. Biddle to show that Commonwealth & Southern was trying to get too high a price from the TVA for Tennessee Electric Power Company property, Mr. Willkie quoted the auditing firm of Arthur Andersen & Company in a report prepared for him as showing that "depreciation for income tax purposes and for corporate purposes are quite different things; and that 'there is probably not a single corporation of any consequence which reports for income tax purposes the same net income that it shows on its books and in its financial report to stockholders.'

"This difference," Mr. Willkie went on, "is recognized by the United States Treasury Department and by court decisions and is made necessary by reason of the arbitrary provisions and frequent changes of the Federal income corporate tax laws in the last twenty-five years.

"In addition the published reports to stockholders and others of the Commonwealth & Southern Corporation and its subsidiaries have shown the existence of such differences."

MR. Biddle asked Mr. Willkie, with respect to the latter's complaint about PWA grants, whether it was not the government's policy to make such grants only where negotiations for the purchase of private property by the municipality had collapsed. Mr. Willkie said that the PWA had made such a rule, but that it was based upon prices fixed by the PWA administrator, himself (Mr. Ickes). Whereupon, Mr. Biddle inquired whether the Federal Power Commission might not be a fair arbiter. Mr. Willkie replied:

"No, it has been required to work in close coöperation with TVA and is biased. We have to go to Mr. Ickes, who says the city's offer is a fair price, and, since we won't pay it, he'll give the city a 45 per cent grant of public funds, absolutely free money, and the rest in a government loan on which it pays a very low interest rate, to duplicate our facilities."

It was here that Mr. Willkie described the government's competitive tactics as "cruel, brutal, unfair, and un-American." He said it was "hard to speak of these things without indignation" after telling of the TVA's building a transmission line to the "very gates" of the city of Chattanooga and of the PWA's making grants and loans to the city.

"But that was after you had held them up for three years after the people of Chattanooga had voted for public power, was it not?" Mr. Biddle asked.

"No, no, no!" the witness exclaimed. "They told us we had to break up our system into pieces and sell them certain parts they wanted, or they'd duplicate us with PWA money. They want to take the cream and leave us the skimmed milk."

MR. Willkie said that he had frequently suggested arbitration or condemnation as a solution of the Tennessee negotiations. He declared that condemnation commissions were "usually fair" and disagreed with Mr. Biddle who said that condemnation usually meant a price 15 or 20 per cent higher than otherwise would be paid. Congress, the witness argued, could pass enabling legislation to authorize the TVA to use condemnation in buying the Tennessee Electric Power.

Collateral developments resulting from the foregoing testimony before the joint congressional committee included a statement by the chairman of the Chattanooga power board denying that the city was acting "in concert" with the Federal government in purchase negotiations involving Commonwealth & Southern property and stating that the Chattanooga power board was unwilling to accept arbitrations "by some board or group whom Mr. Willkie may have reason to believe he could jockey a better deal out of than he could this board."

Mr. Willkie alleged that the parallel attitude of both the city of Chattanooga and the TVA in refusing to consider independent arbitration was additional evidence of a deliberate plan to drive down the market value of private utility properties through threats of destructive government duplication.

ON November 29th, after the joint congressional committee had completed its phase of investigating the position of private utility witnesses and had turned to an examination of past differences between TVA and the General Accounting Office, Senator Norris issued a statement to the press which branded Mr. Willkie's suggestions about arbitration as "insincere" and gave as a reason for lack of public confidence in utility securities today the evidence taken by the Federal Trade Commission some years ago in its investigation of the private power industry.

The March of Events

Bell Brief Charges FCC Bias

THE proposed report of the Federal Communications Commission on its investigation into the activities of the American Telephone and Telegraph Company was criticized by the company on December 5th as "unfair," "incomplete," "unsound," "distorted," and "flagrantly biased."

The $5,000,000,000 corporation submitted a 280-page answer to the report which delved deeply into the A. T. & T. financial structure and made more than 100 findings.

The report was prepared by FCC Commissioner Paul A. Walker last spring in conformance with an inquiry ordered by Congress three years ago.

The A. T. & T. charged the report sought to present the Bell System as "something menacing, as an institution built by sharp practices and in disregard of public interest, and as an organization motivated by greed and as a business functioning as a monopoly—in the odious sense of that term."

In some cases, it said, the statement of "half truths and innuendo is relied upon to accomplish this end." It added that the report ignored the fact that this nation had the "best telephone service in the world."

Declaring the facts did not fit the pattern of the report, the company said authors of the report "should have been frank enough to accept and state the indisputable fact that public opinion and the statutes of the states and the nation have looked for many years toward a regulated, unified service rather than toward competition in the telephone field."

The company branded as "fantastic" that portion of the report which proposed drastic Federal regulation of the telephone industry.

SEC Commissioner Appointed

PRESIDENT Roosevelt on November 29th announced the appointment of Representative Edward C. Eicher of Iowa as a member of the Securities and Exchange Commission to fill the vacancy created by the transfer of John Hanes to be Under-Secretary of the Treasury.

The President said he had selected Mr. Eicher for the SEC because of his general knowledge of economic problems and because he thought the Middle West should be represented on the commission. Mr. Eicher is now a member of the joint congressional executive committee investigating monopolistic practices, and a member of the House Interstate Commerce Committee.

A member of the House until the new Congress convenes on January 3rd, Representative Eicher declined to run for reëlection in the primary campaign in Iowa last summer. He gave as his reason a desire to devote his full time to his work on the monopoly-investigating body. It was assumed, therefore, that he would continue to participate in the committee's inquiry as a member of the SEC.

TVA Investigation Progress

IN addition to the testimony of private utility company witnesses (digested on pages 837 to 849 of this issue), the joint congressional committee investigating the Tennessee Valley Authority on November 30th heard the testimony of Acting Comptroller General Richard N. Elliott and Stuart B. Tulloss, chief investigator of the General Accounting Office.

These witnesses testified to differences over accounting methods and procedure which the General Accounting Office has had in the past with the Tennessee Valley Authority. The principal feature of Mr. Elliott's testimony dealt with reputed "interference" by TVA with efforts to audit its books. Elliott said that his office had challenged the validity of about $18,000,000 of expenditures but that TVA had subsequently offered satisfactory explanation for all but $6,000,000 which is still being straightened out.

Mr. Tulloss testified that TVA had purchased $850,000 of property from the Mississippi Power Company without first obtaining a clear title. This brought a direct denial from the committee's counsel, Francis Biddle, and precipitated a controversy between committee members. The witness went on to say, however, that as far as he knew there had been "no dishonesty worth investigating" in TVA's large expenditures. His testimony was concurred in by William A. Owen and Francis T. Matchett, assistant investigators, who said that while there had been some "minor shortages" in TVA accounts, most of these had been made up and no criminal intent to defraud had been uncovered.

On December 5th, the committee again heard former chairman of the TVA, Dr. A. E. Morgan, combine criticism of the authority with an appeal that it be saved by the adoption

of open and aboveboard methods. Dr. Morgan criticized TVA rate making and concealed subsidies, but said that in spite of such defects he considered TVA an important adventure in government. The former chairman had previously accused TVA of "giving power away." Among the critical points in his statement were these:

1. That the TVA will operate at an annual deficit of $3,156,852 if present power rates are maintained when all seven dams are in service.

2. Instead of a reported profit of $300,000 on operations in Mississippi for the three years ending June 30, 1938, 11 communities of that state which are buying TVA power had a loss of $167,237.

3. That by "high pressure salesmanship" which had "gone beyond propriety," the TVA had sold farmers in the area more power and electrical appliances than they could afford.

4. That special charges for electricity increased the actual rate to consumers beyond the TVA's published rate. These he listed as a development surcharge for industrial and commercial users and an amortization charge of one cent a kilowatt hour. The development surcharge amounted to a "subsidy" to residential consumers, he said.

5. That whereas TVA officials had testified that the authority paid prevailing wages, actually wages in certain communities of the area were "about the lowest in America in that field."

6. That, while contending that it lost large sums by litigation, the TVA showed a preference for "disruption and conflict."

7. That in fixing its rates, TVA did not charge to operating expense an adequate amount of administrative expense, expense of water control operations, contributions of other Federal agencies, such as PWA loans and allotments from the Rural Electrification Administration, or interest on its working capital fund.

8. That the TVA donated a variety of "nursing services" to the "yardstick" communities while the public was being told that the electrical distribution plants of these communities were paying their own way. Among these "nursing services" he listed valuation and appraisal estimates for building distribution systems, house-to-house canvasses to stimulate sales of energy, and various services by the legal division to local distribution associations.

The committee also heard testimony of Colonel Theodore B. Parker, chief engineer of TVA, who replied to the contention that construction of 32 low dam projects along the Tennessee river and tributaries at a cost of $75,000,000 would have afforded ample navigation facilities in contrast with the 10 high dam projects requiring estimated TVA expenditures amounting to $473,000,000.

Colonel Parker said that the TVA investigation of the low dam plan showed that it would cost $163,000,000. He then stressed the multiple-purpose nature of the present TVA construction plans which provide also for flood control and power development. He added that single-purpose development schemes providing for all three phases of TVA development would have cost $554,000,000.

TVA Files Brief

THE Tennessee Valley Authority filed a brief in Federal district court on November 30th defending the power of President Roosevelt in ousting Dr. Arthur E. Morgan from the office of TVA director-chairman.

The brief was filed in support of the TVA's motion to dismiss a suit brought by Dr. Morgan, in which he challenged the President's power of removal and asked recognition as a TVA director with payment of back salary since March 22nd, the date of his removal.

The authority argued "the President has some power of removal beyond that expressly laid down" by the act of Congress creating TVA. This section of the act says a director may be removed by concurrent vote of the House and Senate. The TVA based its position on two propositions:

1. Under the Constitution the President possesses the power to remove any officer of the government who has been appointed by him "by and with the advice and consent of the Senate" upon any ground whatsoever, in the absence of an express limitation or denial of that power in the legislation creating the office, and no such limitation or denial is contained in the Tennessee Valley Authority Act.

2. The power to remove executive officers appointed by him is conferred on the President by the Constitution and cannot be abrogated by statute.

The authority further expressed doubt as to the jurisdiction of the court.

Seeks Further Hearing

THE Federal Power Commission recently announced its receipt of a petition by the Kansas Gas & Electric Company asking another rehearing on the commission's order of December 1, 1936, which held that the company is a public utility subject to Federal regulation and as such cannot apply for the approval of the maintenance of permanent interstate electric connections for emergency use only under § 202(d) of the Federal Power Act. The petition followed upon the heels of an opinion and order adopted by the commission on November 1, 1938, upholding its order of December 1, 1936.

The company sought, through an application filed under § 202(d) of the Federal Power Act, to obtain the approval of the commission for the maintenance of two interstate electric connections for emergency use—one with the Riverton (Kansas) plant of the Empire District Electric Company and the other with the Oklahoma Gas & Electric Company at a point south of Wichita, Kansas, near the Kansas-

Oklahoma state line. Section 202(d) of the act provides, in part, that a company obtaining the approval of the commission to maintain permanent connections for emergency use shall not become subject to the jurisdiction of the commission under Part II of the act by reason of such connections, and, therefore, approval of the company's application would have exempted that company from the commission's jurisdiction.

The commission's order and opinion of November 1, 1938, held that the exemption of such facilities from Federal regulation cannot be granted to a public utility which is otherwise under the commission's jurisdiction and pointed out that electric energy generated by the company in Kansas is sold by it to communities in Missouri. In addition, the opinion stated, Kansas Gas & Electric Company also sells electric energy to the Kansas Utilities Company, which is conveyed across the state line into Missouri where it is sold by Kansas Utilities Company at retail.

State Commission Elections

IN the general election on November 8th, the following state commissioners were re-elected:

In Alabama, Commissioners H. F. Lee and W. C. Harrison, Democrats; in Arizona, Chairman Wilson T. Wright (D.); in Florida, Chairman Jerry W. Carter and Commissioner Eugene S. Matthews, Democrats; in Georgia, Commissioner M. L. McWhorter; in Louisiana, Chairman Wade O. Martin (D.); in North Dakota, President Ben C. Larkin (R.).

On the same date the following commissioners were elected to office:

In Iowa, Hon. Barr M. Keshlear and former Commissioner B. M. Richardson, Republicans, were elected to succeed Commissioners Dunlap and Lynch, Democrats; in Minnesota, former Commissioner Frank W. Matson (R.) was elected to succeed Commissioner Atwood (F.-L.); in Montana, Hon. Austin B. Middleton and Hon. Paul T. Smith, Democrats, were elected to succeed Commissioners Carey and Krebsbach, Democrats; in Nebraska, Hon. Duane T. Swanson (R.) was elected to succeed Chairman Bollen (D.); in New Mexico, Hon. Henry Eager (D.) was elected to succeed Commissioner Lamb (D.); in Oklahoma, Hon. Ray O. Weems (D.) was elected to succeed Commissioner Walton (D.); in South Dakota, Hon. C. A. Merkle (R.) was elected to succeed Commissioner Pickart (D.); in Tennessee, Hon. W. D. Hudson (D.) was elected to succeed Commissioner Turner (D.).

Utility Response Delights SEC

WILLIAM O. Douglas, chairman of the Securities and Exchange Commission, on December 1st said that 64 top holding companies in the utility industry, including all the major systems, had given notice of their tentative plans or suggestions for voluntary compliance with the simplification and integration provisions of § 11 of the Public Utility Holding Company Act, or had indicated the extent to which, in their view, they complied with the requirements. (See also pages 831 and 834.)

This the chairman characterized as a response which had surpassed all expectations. He expressed the opinion that, as a result of the character of the responses, the negotiations had passed the stage of litigation and had entered the "broad highway representing constructive action" which would be of great benefit to the industry and the country.

Replies to FPC Order

THE Northern Natural Gas Company, in response to the order adopted by the Federal Power Commission on October 29, 1938, recently stated that it did not oppose construction by the Kansas Pipe Line & Gas Company of a proposed $21,470,000 natural gas pipe-line project, application for which was pending before the commission, on the location and route as set forth in the application.

The company also asked to be relieved of further response to that part of the order which directed it to show cause why the commission should not order it to extend its facilities for the service of natural gas in the territory sought to be served by the Kansas Company. This request was made on the ground that such an order would place an undue burden upon the company.

Oppose St. Lawrence Treaty

THE Mississippi Valley Association, at its twentieth annual convention last month in St. Louis, vigorously opposed the terms of the proposed St. Lawrence power and seaway treaty.

Opposition also was expressed to the proposed creation of seven little TVA administrations and the construction of high dams for power and flood control, it was said. The association demanded, rather, construction of low dams for the purpose of flood control.

Other objectives named by the association, it was reported, were a demand that the Wagner Labor Relations Act be so revised as to insure equity and justice among all groups, regulation of privately owned public utilities on a basis that will be fair to the multitude of investors who supply the funds for these necessary quasi public works, and the early completion of pending flood control and navigation projects.

The New York State Chamber of Commerce on November 27th made public a report declaring that, because of the developments in the last ten years, the prospects of the St. Lawrence canal and power project becoming a valuable utility "are less today than at any time since it was first proposed."

California

Electric Rates Reduced

As a result of negotiations between the San Diego Consolidated Gas & Electric Company and the state railroad commission, rate reductions aggregating $168,000 annually will be put into effect on January 1st. The new rates represent the fifth major reduction in company electric rates in the last four years.

Through these reductions, present electric customers have received an annual saving of $1,060,000; gas rate reductions totaled $240,000 a year.

The major portion of the new reduction will be made available to small domestic and commercial users in the cities of Coronado, San Diego, National City, San Clemente, Chula Vista, La Mesa, El Cajon, Oceanside, and Escondido. These aggregate $155,000 annually, or 93 per cent of the total reduction.

The commission said reductions also were made in public street lighting rates for installations of sizes above 100 candle-power in all cities served by the company.

Rates in unincorporated territory were not affected. Nor were industrial and agricultural power rates changed except for certain governmental services.

Indiana

Gas Firm Sues

Officers and directors of the Indiana Gas & Chemical Corporation and of Universal Gas Company, both of Terre Haute, and the companies themselves, were sued on November 26th by the Kentucky Natural Gas Corporation for $450,000, triple damages for violation of Federal statutes against restraint of trade.

The suit, filed before Judge Robert C. Baltzell of the Federal district court, alleged the defendants as individuals conspired to prevent the citizens of Terre Haute, West Terre Haute, Clinton, Brazil, Greencastle, Martinsville, Bloomington, Bedford, Mitchell, Franklin, Columbus, and Seymour from obtaining natural gas which the Kentucky company had contracted to provide for them through the facilities of the two companies. The defendants are:

Alfred M. Ogle, Indianapolis, president and general manager of the Indiana Gas & Chemical Corporation and the Universal Gas Company; Omar A. Wilson, Terre Haute, secretary-treasurer of the two companies; Harvey L. Comin, Terre Haute, director of Universal Gas; Philip L. Gill, T. Raymond Pierce, and Philip A. Russell, of New York; Bertrand J. Perry, of Massachusetts, and Albert E. Pierce, of Virginia, all directors of Indiana Gas & Chemical Corporation, the Indiana Gas & Chemical Corporation, and the Universal Gas Company.

The plaintiff contended contracts were made with the two defendant companies under the terms of which Ogle and his associates were to promote the use of natural gas to be provided by the Kentucky Natural Gas Corporation to the citizens of the aforesaid cities who are being supplied with mixed gas of 570 B.T.U. content, but that Ogle and associates failed to carry out the contracts.

The Indiana Gas & Chemical Corporation operates coke ovens at Terre Haute, and it is the theory of the complaint that in order to make the coke business profitable, the management continues to use coke gas enriched by natural gas in serving the area, although contracts had been made to take from Kentucky Natural Gas Corporation a sufficient amount of natural gas to supply the citizens in the area with natural gas of 1,000 B.T.U. content.

The Indiana Gas & Chemical Corporation on November 28th filed a petition for a perpetual injunction to prevent the Kentucky Natural Gas Corporation from terminating its contract to provide natural gas to the 12 Indiana communities involved.

Kentucky

Section of Act Unconstitutional

The court of appeals on November 22nd held unconstitutional that part of an act of the 1936 general assembly which provided that before any city is authorized to purchase, establish, or operate an electric light, heat, and power plant, the plan must be approved by a majority of the voters of the city.

The decision was in the case of W. B. Booth against the city of Owensboro, and affirmed the Daviess circuit court's ruling.

The case involved issuance of $1,300,000 bonds by the city to rehabilitate its municipally owned electric light and power plant and waterworks, the proceeds of the bond issue to be supplemented by a grant of $1,041,000 from the Federal government. Issuance of the bonds

was held valid by the state court of appeals.

The court held the referendum provision of the 1936 act unconstitutional because the title of the act made no mention of the referendum provision but merely extended to other cities the provisions of an existing statute enabling cities of the third class to acquire or improve their electric plants.

Louisiana

Jurisdiction Left with Parish

BY unanimous vote, the state public service commission recently refused to deprive the Jefferson parish police jury of jurisdiction over the application of the Gulf Natural Gas Corporation for a gas franchise in the parish and take the matter into its own charge.

Chairman Wade O. Martin of the state commission, with the concurrence of Commissioners James O'Connor, Jr., and John S. Patton, sustained the exception of the police jury that the appeal had been taken to the commission prematurely, and dismissed the applicant's petition "without prejudice."

Asked by Senator Harvey Peltier, one of the attorneys for Gulf Natural Gas, what was meant by this expression, Chairman Martin explained off the record that it left the applicant free to present the case again at some future date, should the police jury fail to act on the request.

Mississippi

PWA Announces Loan

THE Public Works Administration on November 22nd announced financing of its first public power project under its new policy governing competition with existing private utilities. Administrator Ickes announced a grant of $126,000 for Columbus to build its own electric distribution system, which is in direct competition with the Mississippi Power Company.

In reviewing the efforts of the city to purchase the present electric distribution system from the power company, Mr. Ickes stated that on July 7th Columbus was given a PWA grant of $126,000 to apply on purchase of the system. The city then offered the power company $232,000 for the present system which serves 2,500 customers. Mr. Ickes said the power company had refused this offer and in turn had asked the price of $536,366 for its system.

The Mississippi Power Company subsequently released a statement outlining factors involved in its refusal to sell electric properties to the city for the price which the PWA said had been determined by Administrator Ickes as being a "fair and reasonable offer."

The power company stated that the city of Columbus only offered to purchase the steam plant and local distribution system, and that a considerable length of transmission line and the step-down substation would be rendered useless in serving the city of Columbus if the distribution system and steam plant alone were sold. Hence, the company maintained, the city's offer to purchase certain property did not constitute an offer to purchase the property with which new construction to serve the city of Columbus would be competitive.

In connection with the property which the city did not propose to buy, the company stated that an independent firm of engineers employed by the power company to appraise the property had arrived at a present real value of operating plant, after depreciation deductions, of $536,366. This was said to represent a value of nearly double that offered by the city of Columbus.

Nebraska

Ickes Backs Plan

SECRETARY of the Interior Ickes on December 2nd approved a proposed bond adjustment under which two Nebraska public power districts may purchase private utility properties to create the nation's first noncompetitive, statewide public power system.

Ickes said he consented to modification of an indenture securing PWA bonds on the Central Nebraska Public Power and Irrigation District and the Loup River Public Power District.

The districts, established by the state, have built extensive generating facilities with PWA financial assistance and are now extending their distribution facilities. Ickes said the decision to purchase the private properties and the arrangements for financing were entirely the districts', and the question he had to decide was whether the interests of the govern-

ment would be jeopardized by the purchase of the properties. Terms and conditions were worked out which would protect the Federal interest and the value of the bonds now held by the government as security for PWA loans, Ickes said.

New York

Hotel Phone Rates Reduced

An order for reduction of rates by the New York Telephone Company on telephone calls through switchboards in the hotels of the state was handed down on December 5th by the state public service commission, following hearings in which representatives of the company and of state and local hotel associations have appeared. The commission ordered the changes to be made effective January 1st.

Under the commission's order, the maximum surcharge which may be applied to toll calls originating at hotel guest-room telephones is to be 5 cents when the toll charge is 50 cents or less, and 10 cents when the toll call is above 50 cents. Fairly standardized hotel service charges for toll calls have ranged from 10 cents on the first 50 cents of toll charge up to $1 on calls in which the toll rate is more than $10.

The commission's order would also prohibit hotel telephone services from charging for overtime on local calls, unless the hotel is charged for such overtime by the company, and this is not usual, according to the state commission.

Under the commission's order, the telephone company is required to apply the same rates at all hotel lobby telephones, whether calls are handled by the hotel through its switchboard or in booths installed and maintained by the company. This would make the basic charge for a local call 5 cents when routed through the hotel operator, instead of the usual 10 cents.

The commission adopted its ruling by a 4 to 1 vote, with Commissioner Neal Brewster, the lone dissenter, filing a minority memorandum.

Files Complaint with FPC

The state public service commission recently filed with the Federal Power Commission a complaint against the New York State Natural Gas Corporation charging that the rates charged by that company for natural gas sold and delivered to the Central New York Power Corporation for mixing with manufactured gas are unjust and unreasonable, and petitioning the Federal Power Commission to fix just and reasonable rates for such gas.

Stating that it was conducting a proceeding to fix the just and reasonable rates and charges for gas sold and delivered by the Central New York Power Corporation to consumers within the state of New York, the state commission set forth that the determination of such rates was, among other things, dependent upon the price paid by the Central New York Power Corporation to the New York State Natural Gas Corporation for natural gas, which is brought into the state from Pennsylvania.

Under an agreement entered into between these corporations on December 5, 1931, and an amendment thereto dated June 8, 1932, a different and higher charge is made for natural gas to be used by the purchasing corporation for enriching its manufactured gas than for gas sold by the Central New York Power Corporation to certain of its industrial consumers, the complaint of the public service commission stated.

North Carolina

Answers Charge

Commissioner Stanley Winborne of the North Carolina Utilities Commission has made a full reply to the charge of the North Carolina Merchants Association that the intrastate long-distance rates of the Southern Bell Telephone Company in that state "are the highest of any state served by this company" (November 10th, Public Utilities Fortnightly, p. 661) showing in a detailed analysis of the rates that the charges are without merit. The greater number of people are interested in monthly rental rates and charges than in toll rates, but, says Commissioner Winborne:

"Comparing all classes of intrastate toll rates in North Carolina with those of the other states, there is a very slight difference between the rates in North Carolina and the other states, with the exception of Tennessee, and in the case of Tennessee there is not much difference until you reach the very long-distance messages, when the Tennessee rates go below North Carolina."

And he adds: "A discussion of rates for telephone service within a state cannot justly exclude the item of taxes, which is a vital factor in the operation of the utility and one which, in fixing rates, cannot be overlooked. It should be noted in this connection that the total tax per telephone paid by the Southern Bell Com-

pany in North Carolina is 25.4 per cent higher per telephone than in the other eight states in which the Southern Bell Company operates. The average tax per telephone paid by the Southern Bell in North Carolina is $9.77 per year, while the average tax paid per telephone in the other eight states is $7.79 per telephone per year, a difference of $1.98 per telephone per year greater in North Carolina."

As to the charge that the company earned 8.82 per cent on its average net investment in 1937, the commissioner points out that return is not based on net investment and that the company did not earn 8.82 per cent in 1937.

Pennsylvania

Fails of Appointment

ARTHUR Colegrove, Governor Earle's appointee to the state public utility commission, last month failed of confirmation by the state senate.

Governor Earle at the time made no decision on the vacancy existing on the state utility commission caused by Colegrove's rejection. John Sullivan, head of the Bureau of Civil Liberties, was said to be among those considered for the post.

The governor subsequently named Colegrove to his former post of Secretary of Property and Supplies. The term expires January 17th when the present administration goes out.

Tennessee

TVA Accepts Application

MAYOR Thomas L. Cummings, refusing to be "rushed" into obtaining TVA power for Nashville without proper study and preparation, announced recently that the board of directors of the Tennessee Valley Authority had accepted the city's application for power.

The mayor said negotiations with TVA relative to obtaining TVA power for Nashville would continue in a careful and orderly manner for the best interests of the citizens.

He acknowledged the receipt of a communication from the Tennessee Railroad Employees and Citizens League, an organization of railway employees founded several years ago. He said that he had no comment to make on the communication, which stated that TVA was a threat to railway employment.

Proceeds with Plans

CITY officials of Memphis early this month ordered full speed ahead on construction of a municipal system to distribute TVA power and prepared for a fight to the finish with the Memphis Power & Light Company.

Major Tom Allen, chairman of the light and water commission, replied by letter to the utility's request for more time to consider the city's "final" offer of $17,385,000 for its gas and electric properties. The letter said that "inasmuch as your responsible officers have evaded their responsibility to make a definite recommendation" of acceptance to stockholders, "we have no alternative save to proceed immediately with construction of our municipal system."

Ruling Affirmed

THE state supreme court on November 25th disposed of several points of law in the litigation at Etowah over the city's election to issue $400,000 of bonds for financing construction of a municipal electric utility plant.

The Etowah Water and Light Company and others filed suit contesting the alleged victory of pro-bond advocates by 13 votes, asserting the bond issue was defeated by 8 votes.

The court affirmed a lower decision holding the scrolls of the clerks of the election, showing a majority of 13 votes for the bond issue, must be accepted. However, the court held the lower court was in error in overruling a demurrer by defendants in connection with protests that the board of commissioners and not the election commissioners canvassed returns.

Texas

LCRA Refuses to Buy

THE Lower Colorado River Authority last month announced that after extended study it had declined to purchase Texas Power & Light Company properties in a 16-county area which the authority will serve with power to be generated at its dams. Max Starcke, operations manager of the authority, told John W. Carpenter, president of the Texas Power & Light Company, that the $7,398,016 asked was too high.

The company had declined an offer of $4,000,000, said Starcke, who gave as a further reason for declining the offer that it would confine the authority's activities, in so far as the Texas Power & Light Company is concerned, to the 16 counties, and that it would preclude the authority's coöperation with other public agencies seeking to develop Texas rivers.

The company made its offer September 6th. It stated that it would sell all but not less than all of the properties acquired in connection with its business in the area. Included were some ice plants and water systems.

Since the power company made its offer many towns in the area have voted to construct municipal light distribution systems for LCRA power, and preparations to get them into service are going forward, authority officials said.

Presidential approval of PWA allotments totaling $459,922 for electric distribution systems in 8 Texas cities in the area to be served with power from the Lower Colorado River Authority projects was announced recently by the regional PWA headquarters in Fort Worth.

Municipalities on the list were Llano, Kyle, Lampasas, Fredericksburg, Bastrop, Burnet, Marble Falls, and Luling. The estimated construction cost is $524,272, to be financed by loans of $224,000 and grants of $235,922. While each project is separate, the 8 together form a part of the general power development of the area. The applicants have assured PWA officials that all these projects will be under construction by January 1, 1939.

Washington

Orders Condemnation Suits

THE Lewis county public utility commission took an important step towards its announced plans of operating the county's electrical utilities in an integrated power system when in special session at Chehalis on November 26th it adopted resolutions authorizing condemnation of three facilities, providing for financing and approving eventual tie-up with Tacoma's municipal power unit.

One resolution empowered the district's attorneys to file condemnation against the Interstate Power & Light Company, operating in Lewis and Pierce counties; the Washington Gas & Electric Company's property at Morton; and the Cowlitz Valley Power Company, owned by T. E. and B. Donaldson.

The other authorized issuance of $250,000 of revenue bonds for acquisition of the three utilities, construction or reconstruction of three transmission lines, modernization of distribution facilities, and acquisition of the three utilities' substations, generating plants, street lighting, and other equipment.

The $250,000 of bonds, expected to cover costs of the program, will be issued in $1,000 denominations at interest not exceeding 6 per cent, maturing commencing with the second and ending with the thirtieth year after issuance. From an "electric bond fund, 1938," containing gross revenues, the district will pay the bonds and interest.

Under terms of the resolutions, the district proposes to acquire all of the Interstate Company's property, including a 13,200-volt transmission line from Divide to the Washington Gas & Eiectric and extending through Elbe to link with the Rainier National Park Company in Rainier National Park.

It would also acquire all of the Washington Gas & Electric's property in Lewis county, except for a transmission line extending from Longview through southwestern part of Lewis county to Ryderwood, but including a 13,200-volt line from Divide through Morton to Kosmos, and a hydroelectric plant on the Tilton river near Morton.

Acquired, also, would be the Cowlitz Valley utility, including a 6,900-volt line from Salkum, where it connects with the Puget Sound Power & Light Company, running to Riffe.

For unification purposes, the resolutions also authorized the district to construct or acquire a 23,000-volt line connecting with the Interstate Company near Elbe and extending to Tacoma's municipal lines near Alder; construction of a 13,200-volt line connecting, near Riffe, the Washington Gas & Electric's lines with Cowlitz Valley; rebuilding the Washington Gas & Electric's and the Interstate's transmission lines from Mineral to Morton; reconstruction of distribution facilities in Morton.

Seek Telephone Law

THE Seattle city council's legislative committee will ask the state legislature to amend the Public Utilities Act to permit cities to establish their own telephone systems. The council, however, is not planning to establish a telephone system immediately, it was said.

At a special session late last month, the council adopted President David Levine's resolution directing the legislative committee to ask an enabling act of the legislature. But Councilman Hugh DeLacy's resolution, calling upon Lighting Superintendent J. D. Ross to make an immediate survey so the city might go ahead with organization of a municipal system, was defeated.

Councilman James Scavotto, utilities committee chairman, declared the DeLacy resolution was meaningless without an enabling act of the state legislature.

The Latest Utility Rulings

Local Utility Company Held Subject to NLRB Jurisdiction

WHILE popular interest in the recent decision of the United States Supreme Court in the so-called Consolidated Edison Case was, for the most part, diverted to that portion of the court's opinion which dealt with the right of the National Labor Relations Board to set aside a bargaining contract between an employer and a union organization, of primary significance to the utility industry was the preliminary or jurisdictional ruling by the court in the same case which upholds the authority of the NLRB over public service companies whose physical operations are of an intrastate character.

The majority opinion by Chief Justice Hughes (from which Justices Butler and McReynolds dissented) conceded that the physical operations of the Consolidated Edison system are confined to the rendition of gas and electric service almost entirely within the state of New York and, for the most part, within the metropolitan area of the city of New York. The court went on to point out that by very reason of the fact that Consolidated Edison system does render a vitally essential public service to such institutions as the Port of New York, the Holland Tunnel, the New York Telephone Company, and the local railroad, telegraph, and radio organizations, the right of the Federal government to see that these essential interstate businesses are not interrupted through labor disputes becomes paramount. Justice Hughes' opinion added:

> It cannot be doubted that these activities, while conducted within the state, are matters of Federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the Federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the circuit court of appeals in these words: "Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote." 95 F. (2d) 390, 394.
>
> If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential service to interstate and foreign commerce. But it cannot be maintained that the exertion of Federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

A cautious appraisal of the result of this jurisdictional ruling would appear to confine the indicated boundary of enlarged Federal jurisdiction to the field of labor regulation. Within that field, however, it seems likely that any utility of appreciable size, no matter how local its own operations, may fall within the category of "interstate commerce" for purposes of Federal labor control. The new test suggested by the opinion of the Chief Justice would appear to be: If a local utility renders a vital public service to common carriers, communications carriers, railroad or shipping port terminals, post offices or other Federal agencies, its labor regulations are under the NLRB. In other words, it appears

that a local utility might be engaged in interstate commerce for purposes of Federal labor regulation if some of its important customers are. Telephone, gas, and possibly local rapid transit utilities might even come within this ruling, depending upon the extent to which a sudden hypothetical collapse of their local functions by reason of labor disputes would paralyze "the free flow of interstate commerce."

This decision also is likely to raise the question of whether the jurisdiction of the Federal Wage-Hour Administration, enforcing the Fair Labor Standards Act of 1938, might not be coextensive with that of the NLRB, as far as utilities are concerned. It is not likely, however, that the majority opinion in this case will be construed as indicating an extension of Federal control over local utilities in other regulatory fields than supervision of labor relations. Conventional regulation of the rates and service of local utility organizations (such as the Consolidated Edison system) is still legally under the control of the respective state regulatory commissions, and in this respect it will be recalled that the Federal Power Act, Communications Act, Motor Carrier Act, and Natural Gas Act contain so-called "anti-Shreveport" clauses expressly prohibiting Federal commissions from encroaching upon local utility regulation. *Consolidated Edison Co. v. National Labor Relations Board.*

Order Denying Exemption from Holding Company Act Not Reviewable

THE circuit court of appeals, fourth circuit, dismissed a petition for review of an order of the Securities and Exchange Commission denying an exemption from the provisions of the Public Utility Holding Company Act of 1935.

The court adopted the same theory on the subject of negative orders as was followed in Newport Electric Corp. *v.* Federal Power Commission (1938) 25 P.U.R.(N.S.) 40, and disagreed with the holding by the circuit court of appeals, ninth circuit, in Pacific Power & Light Co. *v.* Federal Power Commission (1938) 98 F. (2d) 835, 25 P.U.R.(N.S.) 458.

This order, according to the court, did not impose any duty upon the petitioner, nor did it prohibit any action. *Houston Natural Gas Corporation v. Securities and Exchange Commission (No. 4389).*

Confidential Information Adduced in Hearings Before Commission

THE Securities and Exchange Commission denied a motion for confidential treatment of information and data adduced in the course of a hearing on the question whether or not a corporation was a subsidiary of certain named companies. The commission found nothing in the motion papers or in the oral argument to support an allegation that disclosure of such information would result in irreparable harm and injury to the companies involved. Moreover, it was said, the varied types of information which the company was seeking to conceal were precisely the types of information which the Congress sought to make available to investors.

The claim was made that hearings already held had resulted and would continue to result in the disclosure to competitors, other investing companies, and security dealers and the public of the nature and character of the company's established policies for the investment of its funds and the particulars and details of its business operations involved in carrying out those policies. These were said to include the nature of the securities in

which the company was interested in investing, the prices which it had in the past and presumably would in the future be willing to pay therefor, the nature of the securities it might be interested in selling, the prices it had in the past and presumably would in the future be willing to sell at, the brokers, organizations, and persons through whom it carried out its transactions, and other details of its business and operations of a highly confidential nature and substantially constituting its trade secrets and processes in carrying out and completing in practice its established investment policies. The commission, in disposing of the question of trade secrets, said:

> The contention that information concerning the method whereby UESCO and NECC carry on their investment business and their purchases and sales of securities constitutes "trade secrets or processes" is wholly without merit. These terms are not defined in the act and are therefore to be given the meaning which they have at common law. Henry *v.* United States (1920) 251 U. S. 393; Keck *v.* United States (1899) 172 U. S. 434. The decided cases are clear that the concept of "trade secrets or processes" does not encompass information of the character here involved. The court of appeals for the District of Columbia, for example, has defined the term "trade secrets" as an "unpatented, secret, commercially valuable plan, appliance, formula, or process which is used for the making, preparing, compounding, treating or processing articles which are trade commodities." United States ex rel. Norwegian Nitrogen Products Co., Inc. *v.* United States Tariff Commission (App. D. C., 1925) 6 F. (2d) 491, 495, vacated (1927) 274 U. S. 106.

Section 22 of the Public Utility Holding Company Act relating to nondisclosure of information contained in any statement, application, declaration, report, or other document filed with the commission was held to be inapplicable to a record of evidence at a hearing, whether such records be composed of a transcript of oral testimony or documents introduced as exhibits or both. It was said that testimony and exhibits are both evidence and their disclosure depends upon whether the hearing is public or private as determined by the commission under § 19 of the act, in the public interest or for the protection of investors or consumers.

The securities commission, in considering a claim for a private hearing, said that it could not ignore the express findings of the Congress and the enumeration of particular abuses against which the act was designed, including lack of adequate information. *Re Utilities Employees Securities Co. et al. (File Nos. 31-419, 60-1).*

Pennsylvania Commission Modifies Rulings on Plan of Transit Reorganization

THE Pennsylvania commission, after consideration of exceptions to its order nisi in which it disapproved an application of the Philadelphia Rapid Transit Company for approval of a plan of reorganization, reiterated its disapproval but changed some of its findings. It made recommendations as to changes in the plan which might make a reorganization possible.

A smaller deduction was made for accrued depreciation than in the preliminary order. The commission, although disagreeing with the evidence presented in support of an allowance for cost of financing, made an allowance representing roughly 5 per cent on the depreciated original historical cost of the physical assets. Allowances were also made for moneys expended for bridges, overpasses, grading, and pier paving, the commission stating:

> Expenditures for these items in the amount of $770,357 were made for the legitimate betterment of applicant's facilities although applicant admittedly does not hold title (with minor exceptions) to the structures on which these costs were incurred. The Uniform System of Accounts does not expressly require title to be in the company; moreover, we allowed certain costs incurred in connection with the construction of other bridges likewise not owned by the company. Since the benefits of these expenditures are and will be available to the new company,

we will allow this item in the amount of $770,357.

The commission took the position that in the interest of expediting the reorganization, the need of which the commission recognized, every doubt which could be resolved in favor of the applicant's position consistent with the public function of the commission should be so resolved. The point was stressed, however, that the commission was doing this in recognition of the extraordinary circumstances and that its action should not be followed as a precedent. *Re Philadelphia Rapid Transit Co. (Application Docket No. 33559).*

Capitalization of Operating Rights

UNDER the California statutes the commission has no power to authorize the capitalization of any franchise or permit or the right to own, operate, or enjoy such franchise or permit in excess of the amount actually paid to the state or to a political subdivision thereof as a consideration for the grant of such operating right. Accordingly the California commission, in authorizing the issuance of stock for acquisition of motor carrier property, refused to include a claimed value for a certificate of public convenience and necessity. The commission said:

> . . . we wish to place the purchaser upon notice that operating rights do not constitute a class of property to be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited to the number of rights which may be given.

The commission also pointed out that a city carrier permit and a radial carrier permit are not transferable. Therefore it is necessary for a corporation acquiring the motor carrier property, if it desires to continue operations, to file in its own name requests for similar permits. *Re Travis et al. (Decision No. 31216, Application No. 22109).*

Federal Control of Emergency Connections Of Interstate Power Company

A PUBLIC utility company which is subject to the jurisdiction of the Federal Power Commission under Part II of the Federal Power Act cannot, according to a ruling of the Federal Power Commission, obtain exemption of permanent interstate connections for emergency use. The company applying for exemption contended that action might be taken with reference solely to the emergency connections without prejudice to the commission's assertion of jurisdiction with respect to other facilities.

It was urged that the question of public utility status of any company applying for commission approval to make permanent connections for emergency use only is unimportant. The commission took the position that an exemption of such connections may be given only to persons not otherwise subject to the jurisdiction of the commission. It was said:

> A curious situation would result in requiring those companies already subject to Federal control as public utilities under the act to secure specific permission for each permanent connection for emergency use only, when such permission is not required for other connections by such companies.

A determination was also made that the company was a public utility subject to commission jurisdiction under § 201(e) of the Federal Power Act. In making this ruling, the commission held

that facilities for the transmission of electric energy from the state in which it is generated to another state where it is consumed are facilities for the transmission of electric energy in interstate commerce.

Also, it was said to be unnecessary to decide whether such interstate facilities were "transmission" or "distribution" facilities so long as they were not within a class of facilities specifically excluded under § 201(e) of the act. There was said to be nothing in the act or in its legislative history to indicate that Congress intended to draw any nice distinction between transmission and distribution as related to the conveyance of energy across state lines. *Re Kansas Gas & Electric Co. (Docket No. IT-5023, Opinion No. 34).*

Other Important Rulings

THE supreme court of Ohio dismissed an appeal from an order of the commission fixing telephone rates on the ground that the appellant was not a party to the proceeding before the commission, stating that unless a statute otherwise provides it is fundamental that no one can appeal from an order to which he is not a party. *Harrison et al. v. Public Utilities Commission, 16 N. E. (2d) 943.*

The Federal Communications Commission granted a radio station construction permit notwithstanding the fact that the applicant had been convicted of violating a statute, where the violation involved no moral turpitude, was unintentional, and injured nobody. The evidence showed that the applicant enjoyed a good reputation in the community in which he resided and there were no facts showing any lack of character or qualification required of a licensee. *Re Asheville Daily News (Docket No. 4002).*

The Wisconsin commission, in establishing rates of a municipal water utility, held that excess labor costs in the WPA project adding to the installation costs should not be set up as a cost upon the books of the utility. *Re Pardeeville (CA-747).*

The supreme court of Arkansas sustained a judgment for a gas company in a suit by a customer for wrongful cutting off of gas in a restaurant, where the jury in the lower court had found that the customer had breached his agreement to make a deposit after installation of gas. The court considered it irrelevant that other customers may have been furnished with service for a smaller deposit, since the amount of deposit was based upon the probable amount of gas that would be consumed and the promptness with which the customer had previously met his bill. *Treadway v. Arkansas Louisiana Gas Co. 120 S. W. (2d) 378.*

The court of chancery of New Jersey held that in the absence of a statute expressly authorizing it, or making arrearages in water rent a lien on land, a municipality owning or controlling waterworks and supplying dwellers and other customers with water in another municipality had no right to cut off the water supply until arrears due from a former owner were paid. *Home Owners' Loan Corp. v. New Brunswick, 1 A. (2d) 854.*

The Missouri commission held that a water utility company should not provide by rule that if an amount deposited by a prospective customer for an extension should be less than the actual cost, the customer would be required to pay an additional amount sufficient to cover the excess cost, since the water company would have sufficient information to make an accurate estimate and should bear the burden of any errors. *Re Raytown Water Co. (Case No. 9561).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

PREPRINTED FROM

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 25 P.U.R.(N.S.) NUMBER 6

Points of Special Interest

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TITLES

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v.

Denis J. Driscoll et al.

(— F. Supp. —.)

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[October 10, 1938.]

SUIT *in equity by electric utility company to restrain Pennsylvania Commission from enforcing temporary rate reduction order; permanent injunction granted. For decision by Commission, see 21 P.U.R.(N.S.) 328.*

By the COURT: This was a suit in equity brought by the Edison Light and Power Company, hereinafter called the company, to restrain the respondents, the Pennsylvania Public Utility Commission, hereinafter called the Commission, and the persons composing the Commission individually, from enforcing its "temporary rate" order of November 30, 1937, directing the company to file a tariff supplement effecting a reduction of approximately $435,000 in its annual gross revenue.

[1–4] It should be stated at the outset that this court is not a rate-making body. The function of fixing the rates of a public utility belongs to the commonwealth. It has the right to control private corporations, whose business, necessarily monopolistic in character, is affected with a public interest. That control, where the fixing of rates is involved, is exercised through one of its agencies, the Public Utility Commission. In exercising this control, the rights of both the public and the corporation must be

considered. The company is entitled to a fair return on a fair value of its property devoted to the public service. The return cannot be so high as to exceed the value of the service to the consumer and cannot be so low as to confiscate the property devoted to that service. In other words the company is entitled to ask a fair return upon the value of the property which it employs for the public convenience and the public is entitled to demand that no more be exacted from it than the services rendered are reasonably worth. Neither is entitled to anything more than these reciprocal rights.

The order in this case was made by the Commission pursuant to § 310 (a) of the Public Utility Act of Pennsylvania of May 28, 1937 (66 PS § 1150) which provides as follows:

"Temporary Rates.—(a) The Commission may, in any proceeding involving the rates of a public utility brought either upon its own motion or upon complaint, after reasonable notice and hearing, if it be of opinion that the public interest so requires, immediately fix, determine, and prescribe temporary rates to be charged by such public utility, pending the final determination of such rate proceeding. Such temporary rates, so fixed, determined, and prescribed, shall be sufficient to provide a return of not less than 5 per cent upon the original cost, less accrued depreciation, of the physical property (when first devoted to public use) of such public utility, used and useful in the public service, and if the duly verified reports of such public utility to the Commission do not show such original cost, less accrued depreciation, of such property, the Commission may estimate such cost less depreciation and fix, determine, and prescribe rates as hereinbefore provided."

The company, feeling aggrieved by the order, made application for a statutory court pursuant to the provisions of § 266 of the Judicial Code. An order convening such court was signed on December 14, 1937, and on the same day a preliminary restraining order was entered against the Commission upon the entry of a bond by the company for $75,000. The motion for an interlocutory injunction came on for hearing on January 17, 1938. At the conclusion of the hearing, the restraining order was continued upon the filing of a bond by the complainant for $150,000. It was agreed between the parties that the matter be treated as an application for a permanent injunction.

[5–7] The company contends that this (§ 310 (a)) is unconstitutional for the reason that it permits the Commission to fix a temporary rate of only 5 per cent of the original cost, less accrued depreciation of the physical property (when first devoted to public use) of the utility, thus basing the rate upon only one element of the utility's property instead of upon all of its property as the decisions of the Supreme Court require.

The Supreme Court in the leading case of Smyth v. Ames (1898) 169 U. S. 466, 546, 42 L. ed. 819, 18 S. Ct. 418, said the following elements must be considered in finding the fair value of the property of a public utility, devoted to the public use:

"And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market

value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

From the time of that decision until the present the Supreme Court in case after case has declared that these elements must be considered by rate-making bodies in fixing a fair return on the fair value of the property of a utility devoted to the public service. Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 S. Ct. 811; Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193, 43 S. Ct. 544, 31 A.L.R. 807; St. Louis & O'Fallon R. Co. v. United States, 279 U. S. 461, 73 L. ed. 798, P.U.R. 1929C, 161, 49 S. Ct. 384; United R. & Electric Co. v. West, 280 U. S. 234, 74 L. ed. 390, P.U.R.1930A, 225, 50 S. Ct. 123; Los Angeles Gas & E. Corp. v. California R. Commission, 289 U. S. 287, 77 L. ed. 1180, P.U.R. 1933C, 229, 53 S. Ct. 637; Dayton Power & Light Co. v. Ohio Pub. Utilities Commission (1934) 292 U. S. 290, 78 L. ed. 1267, 3 P.U.R.(N.S.) 279, 54 S. Ct. 647; Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission (1934) 292 U. S. 398, 78 L. ed. 1327, 4 P.U.R.(N.S.) 152, 54 S. Ct. 763, 91 A.L.R. 1403; West v. Chesapeake & P. Teleph. Co. (1935) 295 U. S. 662, 79 L. ed. 1640, 8 P.U.R.(N.S.) 433, 55 S. Ct. 894. The law of Pennsylvania is to the same effect. Bangor Water Co. v. Public Service Commission (1923) 82 Pa. Super. Ct. 48; Erie v. Public Service Commission, 278 Pa. 512, P.U.R.1924D, 89, 123 Atl. 471. From the nature of the case, these elements, being property rights, must be considered in finding the present fair value of property. For instance, when we consider the constant increase or decrease in the cost of material and labor, the amount spent in permanent improvements, allowance for overheads, working capital, going concern value (which alone the company says is $400,000 in this case) the present fair value of property may be very different from the original cost less accrued depreciation. A rate based upon this one element alone as provided in the act must, in many, if not all, instances, be confiscatory.

[8] The Commission seeks to avoid this inevitable conclusion and the constitutional infirmities of the act by saying that it does not limit the Commission in finding fair value to the consideration of the one element of original cost. It argues that because it "may," not "must," consider the one element only, the constitutionality of the act is saved. In other words, it contends that the test of the constitutionality of an act depends upon the *exercise,* and not upon the *grant* of power. The constitutionality of an act, it says, depends upon what *is* done, and not upon what *may* be done under it. If this contention be true, the constitutionality of an act depends upon the will of men and not upon a rule of law. The mere statement of this contention shows its infirmity. People v. Klinck Packing Co. (1915) 214 N. Y. 121, 108 N. E. 278.

[9] Nor is the constitutionality of the act saved by the provision in § 310 (e) (66 PS § 1150) which provides that:

"If, upon final disposition of the issues involved in such proceeding, the rates as finally determined, are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the differences between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect."

When this question, in the case of Edison Light & P. Co. v. Driscoll (1937) 21 F. Supp. 1, 20 P.U.R. (N.S.) 353, 358, was considered in the middle district of Pennsylvania, the court said:

"Does the fact that the rates fixed are only temporary save the order from the inhibition of the Constitution? We think it does not, and that this question is answered by the case of Prendergast v. New York Teleph. Co. 262 U. S. 43, 49, 67 L. ed. 853, P.U.R.1923C, 719, 723, 43 S. Ct. 466, where the court said: 'Nor did the fact that the orders of the Commission merely prescribed temporary rates to be effective until its final determination, deprive the company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process.'

"It has been argued that the recoupment provision of the Pennsylvania act avoids the infirmity in the New York act which the court pointed out in the Prendergast Case. This argument in effect means that it is proper and legal to violate the Constitution if at some future time that violation may be corrected wholly or in part. In other words, it is perfectly all right and permissible to take one's money by force if by and by it may be partly returned to him. If that is so, how long may the Constitution be violated during which time the injured party is without remedy? May it be for a month, as provided in § 310 (c) of the act (66 PS Pa. § 1150 (c)), or for a trial period of six months or a year as provided in § 310 (d) of the act (66 PS Pa. § 1150 (d))? Such interpretation of the constitutional requirement is unsound.

"Further, the provision for recoupment is not entirely effective. It does not provide for interest on the money, which the company loses during the trial period, while the final rates are being fixed, and if it did so require, considerable portions of the principal lost, might never be recovered. The act provided that if the final rates are

higher than the temporary rates, 'then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined' (§ 310 (e) of the act, 66 PS Pa. § 1150 (e)) the sum lost on account of the temporary rates. But if the consumer discontinues the service or moves out of the territory, as doubtless in a shifting population will be frequently done, the utility in many cases will be absolutely without remedy, for § 305 of the act (66 PS Pa. § 1145) abolishes 'deposits to secure future payments.'"

What was said there is applicable here and the provision in subsection 310 (e) does not save the constitutionality of this section.

We think that § 310 (a) of the act is unconstitutional and what was done pursuant to it is invalid.

If, however, we are in error about this and the section is constitutional, we think that the order is invalid for the reason that it is confiscatory.

The final report of the Commission and the briefs of the parties contain many analyses and a mass of figures which it is difficult for one not a certified public accountant or technical engineer to understand. Some of the figures may be unimportant, but others are important. The Commission found that the rate base or fair value of the company's property for the purpose of prescribing temporary rates is $5,250,000. Another important fact is that the operating revenue received by the company for the year ended September 30, 1937, was $2,202,329. In order to determine the net profit, the expenses incurred in operation, the taxes as adjusted, and the amount the Commission ordered to be deducted from the revenue must be subtracted from this sum. According to the Commission these items aggregate $1,817,829, which subtracted from $2,202,329 leaves a net profit of $384,500. But the company contends that in addition to the items allowed by the Commission, the following allowances should be made: $178,375, rate case expenses; $20,593 increased salary expenses to officers and employees as provided by its board of directors; $15,089 realized by the company on sale of electric energy to York Railways Company which was included in the operating revenue. According to the contention of the company, therefore, the expenses, etc., which should have been allowed, amount to $2,010,680, which subtracted from the income leaves a net profit of $191,649. Should these additional expenses be allowed?

[10, 11] As to the rate case expense of $178,375, the suit was started by the Commission which required the company to produce much of the evidence necessitating the expense for which allowance is sought. There is no contention that the expense was unreasonable or in any manner inflated. The Commission disallowed this expense on the ground, in part, at least, that the company in the past received excessive rates, but this position is untenable, Public Utility Comrs. v. New York Teleph. Co. 271 U. S. 23, 31, 70 L. ed. 808, P.U.R. 1926C, 740, 46 S. Ct. 363, and on the further ground that part of the expense was incurred under the Public Service Company law which was superseded by the Public Utility Act, effective June 1, 1937. The former law included no provision for assess-

ment of the costs of investigation or general regulatory expenses against public utilities. The evidence produced under the predecessor of the Pennsylvania Public Utility Commission was used by the latter. In any event the company did not ask the allowance of the expense on the ground that the Commission has the right to assess the costs, but on the ground that it was a reasonable expense honestly and necessarily incurred, actually paid, and, therefore, ought to be allowed in fixing a fair return. It is the policy of the courts to allow rate case expenses if the complaint of the utility is not unfounded and if the cost of the proceedings have not been swollen by untenable objections. In determining what the rate of return on the property of a utility shall be, "the Commission must give heed to all legitimate expenses that will be charges upon income during the term of regulation, and in such a reckoning the expenses of the controversy engendered by the ordinance must have a place like any others." In speaking of the allowance of expenses of the rate litigation, the Supreme Court further said: ". . . We think they must be included among the costs of operation in the computation of a fair return." West Ohio Gas Co. v. Ohio Pub. Utilities Commission (1935) 294 U. S. 63, 73, 79 L. ed. 761, 6 P.U.R.(N.S.) 449, 455, 456, 55 S. Ct. 316.

[12] Increased salary expenses required to be paid by the company to its officers and employees pursuant to a resolution by its board of directors, if reasonable, should be allowed. The evidence does not show these increases to be unreasonable or exorbitant. A Commission may regulate but not manage a utility. It "is not empowered to substitute its judgment for that of the directors of the corporation." Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 289, 67 L. ed. 981, P.U.R.1923C, 193, 43 S. Ct. 544, 31 A.L.R. 807.

[13] We think that the loss of $20,593, included in the revenue to the company on the sale of energy to the York Railway Company at and upon the abandonment of that company should have been allowed by the Commission. As we understand it the abandonment is certain and is not denied.

The other item in dispute grows out of the adjustment of taxes because of the reduction in revenue of $435,000 ordered by the Commission. The original amount of taxes paid by the company was $333,649 and the Commission allowed a reduction of $127,249 leaving a balance of $206,400 to be paid by the company. The company, on the other hand, says that $148,455 should have been allowed, leaving a balance of $185,194 to be paid. It is not clear just how this difference of $21,206 between them arose, but it does not have a decisive bearing on the case, for the reason that if the contention of the company is correct, it decreases the expense, increases the profit and the rate of return.

[14] If these allowances are made, as we think they should be, the return, as above stated, on the fair value of $5,250,000 found by the Commission is 3.65 per cent. If $5,866,081 is taken as the rate base, the return allowed is 3.27 per cent. Either, under the facts of this case, is confiscatory.

The Commission, however, says that if the rate case expense is allowed and amortized over a period of five years, the profit of operation would be greater and the return would not be confiscatory. But however that might be, it was not allowed in any form, for a single year or amortized, and we must pronounce upon the order as made.

It follows that the company is entitled to a permanent injunction restraining the Commission from enforcing the temporary rates prescribed in accordance with the prayer of the bill.

Findings of Fact

1. Complainant, Edison Light & Power Company, a public utility corporation, duly organized under the laws of Pennsylvania with principal office and place of business in York, Pennsylvania, is engaged in the business of generating, transmitting, distributing, and selling electric energy.

2. Respondents are Denis J. Driscoll, Thomas C. Buchanan, Richard J. Beamish, Donald Livingston, and Arthur Colegrove (successor to Guy K. Bard, formerly a member of the Public Utility Commission of Pennsylvania and now attorney general of that commonwealth), the persons constituting the Pennsylvania Public Utility Commission, and administrative body of the commonwealth of Pennsylvania.

3. Respondent, Denis J. Driscoll, resides in the borough of St. Mary's, in the western district of Pennsylvania; respondent, Thomas C. Buchanan, resides in the borough of Beaver, in the western district of Pennsylvania; respondent, Donald Livingston, resides in the borough of Media, in the eastern district of Pennsylvania; and respondent Arthur Colegrove resides at . . . .

4. The amount in controversy in this case exceeds the sum or value of $3,000 exclusive of interest and costs.

5. On January 27, 1936, the Public Service Commission of the commonwealth of Pennsylvania, the predecessor of respondents, instituted an inquiry and investigation on its own motion for the purpose of determining the justness and reasonableness of complainant's rates. Hearings beginning October 28, 1936, and ending June 23, 1937, were held before respondents and their predecessor, at which testimony and exhibits were introduced by both parties.

6. On June 15, 1937, respondents notified complainant of its opportunity to present, at a hearing to be held on June 23, 1937, such evidence as it might desire in connection with the consideration by the Commission of the imposition of temporary rates, pending final determination of the rate proceeding.

7. Complainant introduced no evidence in specific connection with the possible imposition of temporary rates at the hearing held June 23, 1937, and the respondents set July 5, 1937, as the date for argument which was had on the date fixed. At these hearings complainants contended that the act pursuant to which these rates were fixed was unconstitutional and the case was completed and ready for the fixing of permanent rates.

8. On July 13, 1937 (19 P.U.R. (N.S.) 474), the Commission, without having first given complainant preliminary notice of its findings and conclu-

sions and opportunity to be heard in connection therewith, entered an order directing complainant to file temporary tariff schedules reducing its annual gross operating revenue by about $435,000.

9. Two days thereafter, on July 15, 1937, the superior court of Pennsylvania filed its opinion in Pennsylvania Power & Light Co. v. Public Service Commission (1937) 128 Pa. Super. Ct. 195, 19 P.U.R.(N.S.) 433, 193 Atl. 427, in the course of which the court intimated that the Commission should, whenever practicable, construct a tariff of specific reasonable rates and order its adoption by the utility involved. On July 27, 1937, the Commission issued a report and order rescinding its report and order of July 13, 1937, *supra,* in so far as it was deemed inconsistent with the cited opinion of the superior court. The effect of the order of July 27, 1937, was to prescribe a specific schedule of rates in place of those theretofore charged by the utility, the amount of the ordered reduction and the bases of its computation remaining unchanged.

10. On August 2, 1937, complainant filed a bill, which was heard by a Federal statutory court, praying for an injunction against the enforcement of the Commission's order of July 27, 1937, on the grounds that it violated the Fourteenth Amendment to the Constitution of the United States, that § 310 of the Pennsylvania Public Utility Act, under which the order was issued, was contrary to the Fourteenth Amendment of the Constitution of the United States; that it imposed confiscatory rates; and that the Commission had made no findings to support its conclusions as to the allowable rate base. Oral argument was had on August 9, 1937. On October 15th (21 F. Supp. 1, 20 P.U.R.(N.S.) 353) the Federal statutory court issued a permanent injunction restraining the Commission from enforcing its temporary order and the rates determined therein.

11. Subsequently, on November 17, 1937, certain additional exhibits of complainant and Commission were made part of the rate proceedings by stipulation. (These were introduced into evidence before this court on January 17, 1938, as part of the record.)

12. Thereafter, on November 30, 1937 (21 P.U.R.(N.S.) 328) the Commission issued a supplemental report and order prescribing temporary rates, calculated as previously, to effect a reduction of $435,000.

13. On December 7, 1937, complainant, without first having been given notice of Commission's findings and conclusions and opportunity to be heard in connection therewith, was served with a copy of the supplemental report and order.

14. On December 14, 1937, complainant filed a bill in the United States district court for the eastern district of Pennsylvania, praying for an injunction for the reasons, inter alia, that the order imposed confiscatory temporary rates; that § 310 of the Pennsylvania Public Utility Act, under which the Commission acted was unconstitutional; and that the Commission had applied the wrong provision of the Pennsylvania Public Utility Act to complainant.

15. On December 17, 1937, the Federal statutory court, specially convened under the provisions of § 266

of the Judicial Code, granted complainant a preliminary restraining order.

16. On January 17, 1938, hearing was held by the court and testimony was taken upon motion for an interlocutory injunction. The restraining order was continued upon condition that complainant file a bond in the amount of $150,000. The bond was filed and the parties stipulated that the matter be considered as an application for a permanent injunction. On May 9, 1938, argument was heard thereon and briefs were later filed by the parties.

17. Complainant's rate case expense in the proceedings instituted by the Commission totaled approximately $178,375 up to November 15, 1937. No allowance for any of this expense was made by the Commission in its order of November 30, 1937, *supra*.

18. The rate case expense was necessarily incurred by complainant in an investigation instituted on the Commission's own motion, and it was paid in part for the preparation and presentation of evidence, exhibits, and other data for the use of the Commission.

19. The Commission's order of November 30, 1937, excluded from consideration as an operating expense the item of $20,593 increased salary expense which complainant is required to pay and is paying to certain of its officers and employees pursuant to resolution of its board of directors passed October 28, 1937.

20. The Commission made no allowance for the loss in net revenue to the complainant of approximately $15,089 annually which will result from the abandonment of trolley service by the York Railways Company which now and for many years has purchased power from complainant.

21. The Commission, in its finding of reproduction cost new less accrued depreciation, made no deduction for capital donated to complainant by consumers.

22. The Commission in its order of November 30, 1937, made no separate allowance for going concern value.

23. The Commission, in its finding of original cost depreciated, made no deduction for property used exclusively by York Railways Company.

24. The Commission, in its report and order of November 30, 1937, found that $5,250,000 represented the fair value of complainant's property for temporary rate purposes but the company says the fair value of its property is $5,866,081.

25. The Commission, in its report and order of November 30, 1937, found that a rate of return of 6 per cent would be fair and reasonable for temporary rate purposes.

26. The Commission, in its report and order of November 30, 1937, found that the annual operating revenues of complainant should not exceed the sum of $1,697,829 for temporary rate purposes.

27. The Commission, in its report and order of November 30, 1937, allowed $164,000 for working capital for complainant's business. This allowance is supported in the record by substantial evidence.

28. The Commission, in imposing temporary rates in this case, proceeded under the provisions of § 310 (a), (C), and (e) of the Public Utility Act.

29. Complainant does not have continuing property records. This requires the Commission in fixing temporary rates to proceed under § 310 (b).

30. In fixing temporary rates to be charged by complainant, the Commission proceeded under § 310 (a) which permits the prescription of temporary rates, in the case of a utility having continuing property records, which will produce a return of only 5 per cent on original cost less accrued depreciation of the utility's physical property.

31. Section 310 (paragraphs (a) and (b)) permits the fixing of different rate bases for utilities, depending solely upon a method of bookkeeping, the existence or nonexistence of continuing property records.

32. The Commission's temporary rate order of November 30, 1937, sets no time limit for the duration of the temporary rates it prescribes.

Conclusions of Law

1. The complainant has no plain, speedy, and adequate remedy, either at law or in equity, in the courts of the commonwealth of Pennsylvania.

2. This court has jurisdiction of the subject matter and the parties.

3. The Commission's order of November 30, 1937, is invalid and void because in fixing temporary rates under paragraph (a) of § 310 for complainant, a utility having no continuing property records, Commission acted in direct violation of the mandatory provisions of the Public Utility Act which requires rates for complainant to be fixed under Par. (b) of § 310.

4. The Commission's order of November 30, 1937, is unconstitutional and void because it violates the procedural requirements of due process in the method used to determine the rate base for the prescription of temporary rates.

5. The Commission's order of November 30, 1937, is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States because it takes the property of the complainant without just compensation therefor, in that it fails to permit the complainant to earn a fair return on the fair value of its property used and useful in the public service.

6. The Commission's order of November 30, 1937, is unconstitutional and void because it confiscates complainant's property.

7. The findings and conclusions of the Commission's order of November 30, 1937, are not supported by substantial evidence.

8. The bill of complaint should be sustained and a permanent injunction issued enjoining and restraining the enforcement of the Commission's order.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Public Utility Commission

v.

The Bell Telephone Company of Pennsylvania

(Complaint Docket No. 12589.)

Service, § 134 — Grounds for denial — Illegal activities of subscribers — Leased telephone wires — Gambling information.

A telephone company has the right, and should be required, to refuse service to any place or establishment which has any telephone or telegraph connections with a race track circuit, or its subsidiaries, engaged in supplying information used for unlawful purposes in violation of the gambling laws of the commonwealth.

[October 24, 1938.]

INQUIRY *and investigation on motion of Commission to determine whether or not leased-wire service of a telephone company is used for the unlawful dissemination of horse-racing information in violation of gambling laws; order entered to discontinue service to gambling establishments.*

By the COMMISSION: The Commission instituted an inquiry and investigation on its own motion to determine whether or not the leased-wire service of The Bell Telephone Company of Pennsylvania, hereinafter called the Bell Company, is rendered in a manner that is preferential and discriminatory; whether The Bell Telephone Company of Pennsylvania knowingly leased its facilities for the purpose of permitting individuals to operate unlawfully and illegally its facilities as public utilities in violation of the Public Utility Law, and whether or not the Bell Company knowingly uses its facilities in the unlawful and illegal dissemination of horse-racing information in violation of the gambling laws of Pennsylvania and in violation of the Public Utility Law.

Hearings were held before a member of the Commission on October 20 and 21, 1938. At those hearings testimony was given by an employee of the Federal government, who had conducted an investigation of the leased wire facilities of the American Telephone and Telegraph Company, the parent company of respondent, while in the service of the Federal Communications Commission, the superintendent of the Long Lines department

of the American Telephone and Telegraph Company and Assistant Vice President of the Bell Company.

Uncontradicted testimony from these witnesses developed the following:

In 1927 the American Telephone and Telegraph Company began to render service by the use of leased-wire facilities from various race tracks to other points throughout the United States. This business in 1927 was distributed among some thirteen subscribers. Demand for the service continued through subsequent years and by 1934 the subscribers to this service had been consolidated into one entity, known as the Nationwide News Service, Inc. Some contracts were made in the name of Inter-State News Service, a wholly owned subsidiary. A short time before the hearings the service into Pennsylvania was rendered through agencies of Nationwide in the name of Mohawk News Service, Delaware Sports Informant, Inc., and Seaboard News Service, Inc. However, the entire rack track news dissemination service, rendered through special wires leased from American Telephone and Telegraph Company, is consolidated into one organization, hereinafter referred to as Nationwide.

By 1935 Nationwide had leased-wire connections with some 29 tracks throughout the United States, and from these tracks direct wire service to points in 223 cities located in 39 states and 3 Canadian provinces. The method of operation was that from points of contact with Nationwide's American Telephone and Telegraph race track circuit the information would be fanned out on other leased wires supplied by local operating companies to various pool rooms. The term "pool room" as used in the order, is a gambling establishment where bets are placed on horse races. Under the laws of Pennsylvania the maintenance of a pool room is illegal.

The operation of the Nationwide circuit for dissemination of race track information was fully described by officials of the American Telephone and Telegraph Company and respondent, Bell Company. The assistant vice president of the Bell Company, who testified at this proceeding, denied actual knowledge that facilities of his company in connecting the American Telephone and Telegraph Company-Nationwide circuit with local drops, i. e., a leased wire from a point on the Nationwide circuit to points in Pennsylvania, were actually in pool rooms or places of similar character. The record clearly indicates the contrary.

There were introduced into the record credit cards of the Bell Company which indicate that at the time the facilities were placed in use it was known they were being given to persons whose occupations were listed variously as "book-maker," "horses," "gambler," and "bookie." Where such clear and indubitable evidence of knowledge was not placed in the record, the occupation of the subscriber was either left blank or marked unknown. In many instances second-floor establishments were supplied with drops off the Nationwide circuit, supplied with loud speakers and other paraphernalia which to even a child of tender age would impart a definite knowledge of the questionable character of the establishment. Service was

openly rendered to individuals who were known to be connected with gambling and notorious illegal establishments.

At the conclusion of the record in this proceeding a reference was made to the hearings of the joint legislative committee investigating gambling, and it was agreed that the Commission could take notice of the evidence submitted at that proceeding. In that proceeding it was proved conclusively that the drops, which were supplied off the Nationwide circuit, were inevitably places of gambling, as testified to by state police who have made various raids throughout the commonwealth of Pennsylvania.

We find that Nationwide is principally engaged in supplying information used for unlawful purposes in violation of the gambling laws of the commonwealth of Pennsylvania. We find further that the American Telephone and Telegraph Company had directed respondent to install the facilities of respondent for this purpose, and that respondent has knowingly supplied its facilities in furtherance of these unlawful purposes.

On the basis of these findings an appropriate order shall be made which will eradicate effectively from our commonwealth these unlawful establishments and at the same time fairly meet the problem which confronts the telephone companies.

Perhaps the best explanation of the problem appears in the discussion between counsel for the respondent company and the sitting Commissioner, which we quote as follows:

Commissioner Beamish: Before you answer that question, Mr. Gillen, what do you know about,—or perhaps Mr. Lamb can properly answer it: What would be the attitude of the Bell Telephone Company of Pennsylvania in the event that the Commission should find that these operations are really operations of a gambling house and request that service be discontinued?

Mr. Lamb: Our attitude is that we will abide by any lawful order of the Commission. We feel that the way the law has always stood we have to take it. Now, if lawful authority says we have to get rid of it we will be only too glad to do it. However, we don't think that the burden or responsibility of policing all our telephones ought to be put on the telephone company. There are two or three ways it might be done. It might be that the Commission would order that before we give any leased-wire service that we submit the contract for approval or disapproval. That, of course, would entail a great burden on people who wanted radio circuits over night, particularly legitimate circuits. The other thing would be that every time we get a leased-wire contract we would file a copy with the Commission and the Commission could investigate and decide whether or not they would order us to take it out. I think it would be a very dangerous thing if the telephone company's employees were entitled to say to this man or to that man you cannot have a telephone, because we have got fifteen thousand employees, there are a lot of rules and regulations and everything else, and there are pulls on them this way and pulls that way, and I think that that whole burden ought not to be on the telephone company, because it is too big. The telephone

company ought not to be the censor of telephone service, I think that would be contrary to the laws as they have been. Let me say we would welcome anything that would set this thing in order, and we won't have any objection to any order which we can comply with legally and which does not make us the judge and jury. That is our attitude. Understand we have coöperated with the police for years on these investigations of these various places, and it is known that the News Service has received over wires other than by this company, telephone companies and various other people. This situation is not new.

There is no question that it is the duty of the telephone utilities to render service indiscriminately. However, the law is clear that a utility is permitted to refuse service to those whom it knows are violating the law. We have heretofore found in this order that the drops furnished by respondent from the American Telephone and Telegraph race track circuit, contracted for by Nationwide, and in violation of the law of this commonwealth.

The real root of the offending is not to be found in the actions or policies of any of the local telephone companies, but is discovered in the policy and action of the American Telephone and Telegraph Company through its Long Lines department. The American Telephone and Telegraph Company is one of the most powerful and far-reaching in the United States of America and perhaps in the world. Through its Long Lines department it deliberately and with open eyes entered into contractual obligations with a closely knit group operating under the name of Nationwide. Through this arrangement a monopoly for the transmission of race-track information and results to gambling houses and for gambling purposes has been erected. This combination has permeated Pennsylvania and 38 other states, with the result that a widespread gambling system exists along the lines of the American Telephone and Telegraph system including subsidiary and independent connecting telephone companies whose facilities interlock with the Bell systems of the several states.

We find that this contractual relationship has been entered into between these parties with full knowledge that the messages coming over the facilities of the American Telephone and Telegraph Company are to be used for gambling purposes.

The record before us shows that no mere cease and desist order by this Commission will effectually close the gambling houses now using Nationwide service received over the facilities of the Bell Company and other Pennsylvania telephone companies. It is of record that at about the time this action was instituted the Long Lines department discontinued its direct services to Pennsylvania telephone companies and immediately set up substituted service terminals in places close to the borders of Pennsylvania. The eastern area that had been served from Philadelphia received, under the new arrangements, its gambling material from Claymont and Wilmington in the state of Delaware and from Camden, Atlantic City, Bordentown, and Trenton in New Jersey. The northwestern area of Pennsylvania that had been supplied directly from

Erie over the Hoboken-Montreal telegraph circuit, received under the new arrangement direct telephone service by a full-time circuit from Buffalo. The Pittsburgh activities were transferred to Steubenville, Ohio.

The stream of gambling information has continued undiminished from the new headquarters so strategically located. It was proved by the Bell Company's own records that Pennsylvania pool rooms were connected with these out-of-state Long Lines distributing points along Pennsylvania's borders for periods approximating seven hours on days when the tracks were running, thereby enabling gambling to continue as though the Pennsylvania connections of Long Lines had never been discontinued. The Bell Telephone records further show that the telephone number of the Long Lines connection in Philadelphia, Lombard 0682, had not been changed when the transfer had been made, and that Lombard 0682 was continued as the call for the Camden headquarters.

It is apparent that Federal action will be necessary if the real purpose of this order is to be effectuated. The longer and stronger arm of the Federal government is therefore summoned by us to the aid of Pennsylvania in this effort for proper regulation of the facilities of interstate communications in the interest of the public and against the criminal racketeers who are being served by American Telephone and Telegraph System.

We ask urgently for the coöperation of the Federal Department of Justice and its enforcement unit, the Federal Bureau of Investigation. We further formally request similar coöperation from the Federal Communications Commission.

Finally, we appeal to the Congress of the United States for the enactment of a statute which will uproot this nation-wide evil which is taking millions of dollars in gambling from the homes of America and from the channels of lawful trade.

Congressional action stamped out a similar national gambling scandal when it outlawed the Louisiana Lottery. The unholy alliance between Nationwide and the American Telephone and Telegraph System has caused more murders, embezzlements, and suicides, ruined more homes, and caused more widespread distress than the Louisiana Lottery or any other racket ever devised by clever criminals. It has been estimated that more than $5,000,000 is wagered daily in the pool rooms of the 39 states receiving this gambling service. But this wastage of more than $1,500,000,000 yearly is only part of the story. The deterioration of character, the human wastage in the pool rooms amounts to far greater national loss than any financial destruction.

Counsel for the Bell Telephone Company and the American Telephone and Telegraph System invited suggestions for what Walter Gifford, president of American Telephone and Telegraph system called "This messy business."

We suggest that pending the enactment of a Federal statute, Nationwide should be notified by the Federal Communications Commission that unless it ceases the use of leased facilities of American Telephone and Telegraph Company for gambling purposes, the contract between it and the American

Telephone and Telegraph Company will be canceled.

It is an axiom of law that no corporation, firm, or individual can be compelled by any contract to perform any action or function that is in itself illegal. If the suggested notice be given, the way will be open for an end to the implied partnership and an end will be put to the cancerous pool room racket that has invaded Pennsylvania and that is corrupting the entire nation.

In the interest of the public, and for the protection of respondent company, we hereby direct The Bell Telephone Company of Pennsylvania to cease and desist the rendering of service to any patron of Nationwide or to any location which has a leased-wire service contract with, or a drop from, Nationwide's circuit or any of its subsidiaries, including Interstate News Service, Mohawk News Service, Seaboard News Service, Inc., or Delaware Sports Informant, Inc.

This position is adequately sustained by the law. A long line of cases establishes the rule that a public utility is entitled to refuse to render service or supply its facilities to anyone who is engaged in an unlawful or illegal enterprise: Smith v. Western U. Teleg. Co. (1887) 84 Ky. 664, 2 S. W. 483; People ex rel. Hiegel v. New York Teleph. Co. (1922) 119 Misc. 61, P.U.R.1923A, 463, 195 N. Y. Supp. 332.

There can be no real substantial dispute in the present proceedings from the evidence disclosed, both in the instant proceeding and from the record made by the joint legislative committee, that the service rendered by Nationwide is a necessary element of the widespread system of crime in Pennsylvania. This crime is carried on by patrons of Nationwide and without such service they would be unable to survive. Certainly it is within the power and the duty of this Commission and of the utilities of Pennsylvania to face the realities of this situation. The cease and desist order which we hereafter make is reasonable and is justified by the facts and circumstances of record, and is one with which the respondent company can comply without difficulty;

Therefore, now, to wit, October 24, 1938, it is *ordered:* That the respondent, The Bell Telephone Company of Pennsylvania, forthwith cease and desist from rendering service to any place or establishment which has any telephone or telegraph connection with the race track circuit of Nationwide News Service, Inc., or any of its subsidiaries, including Interstate News Service, Mohawk News Service, Delaware Sports Informant, Inc., or Seaboard News Service, Inc.

It is *further ordered:* That within fifteen days from the effective date of this order The Bell Telephone Company of Pennsylvania, respondent, may file with this Commission a list of subscribers to whom it desires to render leased-wire service, which service will not offend the spirit of this order, such information to include a statement of the occupation and location of the subscriber, a description of his facilities, and that an affidavit has been filed with the respondent that such subscribers are not engaged in any unlawful activities.

It is *further ordered:* That, unless exceptions are filed hereto by The Bell

Telephone Company of Pennsylvania, respondent, or other parties in interest within fifteen days after service of this order nisi, this order shall become the final order in this proceeding.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

Pacific Power & Light Company et al.

v.

Federal Power Commission

[No. 8803.]

(98 F. (2d) 835.)

Appeal and review, § 28.1 — Decision by Federal Power Commission — Support for finding.

1. The circuit court of appeals, under § 313(b) of the Federal Power Act, 16 USCA § 825*l*(b), has authority to review an order of the Federal Power Commission on a challenge that it is not supported by substantial evidence, p. 460.

Consolidation, merger, and sale, § 2 — Right to consolidate or transfer property — Federal Power Act.

2. Section 203(a) of the Federal Power Act, 16 USCA § 824b(a), making authorization by the Federal Power Commission a condition precedent to the transfer of property of a power company, confers a substantive right to the Commission's approval upon compliance with the showing required by the statute that the transfer is consistent with the public interest, p. 461.

Orders, § 1 — Negative or affirmative — Denial of right to transfer property.

3. An order of the Federal Power Commission denying the right to transfer property—a right conferred where consistent with the public interest—is an affirmative decision that the right does not exist and is a final order denying a substantive right, although the order may be in one sense negative, p. 461.

Appeal and review, § 80 — Party aggrieved — Order disapproving property transfer.

4. Power companies which have been denied authority to transfer property, on an application to the Federal Power Commission for approval of the transfer, are parties aggrieved within the provisions of § 313(b) of the Federal Power Act, 16 USCA § 825*l*(b), providing for the review of an order of the Commission by the circuit court of appeals, p. 462.

Appeal and review, § 8 — Order reviewable — Denial of leave to transfer property.

5. The circuit court of appeals has jurisdiction to review an order of the Federal Power Commission denying leave to transfer property, p. 462.

[September 6, 1938.]

PACIFIC POWER & LIGHT CO. v. FEDERAL POWER COMMISSION

MOTION to dismiss petition by electric companies to review an order of the Federal Power Commission denying them the right to transfer property, rights, licenses, and assets; motion to dismiss denied. For Commission decision, see 23 P.U.R.(N.S.) 425.

APPEARANCES: John A. Laing and Henry S. Gray, both of Portland, Or., and A. J. G. Priest and R. A. Henderson, both of New York city (Laing & Gray, of Portland, Or., and Reid & Priest and Sidman I. Barber, all of New York city, of counsel), for petitioners; Oswald Ryan, General Counsel, Federal Power Commission, of Washington, D. C. (William C. Koplovitz and Gregory Hankin, both of Washington, D. C., of counsel), for respondent.

Before Wilbur, Denman, and Mathews, Circuit Judges.

DENMAN, C. J.: This is a motion to dismiss the power and light companies' petition to review an order of the Federal Power Commission denying them the right to transfer all the property, rights, licenses, and assets of Inland Power & Light Company to Pacific Power & Light Company.

The petitioners pray for our order (1) setting aside the order of the Commission and (2) directing the Commission to make and enter an appropriate order granting the authority for and approval of the transfer.

The petitioners had applied to the Commission for the order, hearing was had, evidence adduced, and findings made in support of an order denying the application. A petition for rehearing was filed by the applicants within thirty days of the order, which was denied. The petition for review of the Board's order was duly filed in this court.

Petitioners claim § 203(a) of the Federal Power Act, 16 USCA § 824b (a), while making the Commission's authorization a condition precedent to the consolidating transfer, confers a substantive right to its approval which the Commission *"shall"* give if petitioners show that the transfer is "consistent with the public interest." The act provides:

Section 203. "(a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the governor and state Commission of each of the states in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the

public interest, it *shall* approve the same." (Italic supplied.)

The petition asks review upon two claimed errors of the Commission: (1) That its order rests upon a finding of the Commission that "Applicants have failed to establish that said transfer will be consistent with the public interest within the contemplation of § 203(a) of the Federal Power Act," which finding is not supported by the evidence, but, on the contrary, uncontradicted evidence conclusively establishes that such transfer is consistent with the public interest; and (2) That the Commission erred in holding that the phrase "consistent with the public interest" requires a showing that benefit to the public will result from the proposed merger of facilities before it should receive Commission approval. We are not here concerned with the merits of these contentions but with our jurisdiction to entertain them.

[1] Petitioners claim that they are entitled to petition for and have the requested review under § 313(b) of the Federal Power Act, 16 USCA § 825*l*(b), providing:

Section 313. "(b) Any party to a proceeding under this act [chapter] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. *The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.* . . ." (Italics supplied.)

The last sentence quoted shows the character of review the petitioners are entitled to seek here. We are to review the order as supported by the finding, on a challenge that it is not "supported by substantial evidence." In this the case is distinguishable from Carolina Aluminum Co. v. Federal Power Commission (1938) 97 F. (2d) 435, where, in the absence of an order affecting the petitioner, the finding was held not reviewable.

The Commission moves to dismiss the petition on the ground that the court has no jurisdiction to entertain the review for the purpose of procuring an order or decree that the order of the Commission be set aside. The gravamen of its contention is that although Congress has provided that a party aggrieved may seek a review of an order denying the granting of the permission of the Commission for the exercise of the right conferred by the statute and upon a proper showing have the order set aside, nevertheless this court has no jurisdiction to set it

aside because in denying the right, which "shall" be granted, the Commission's denial is negative in form.

Before discussing the authorities cited by the respective parties, it should be observed that if the contention of the Commission be correct, no remedy exists in the event that a right to the consolidation has been conferred by § 203 (a) of the act, which has been unjustly denied to the petitioning power companies. The provision of the statute for filing the petition for review in this court is, therefore, meaningless. It is obvious review would be sought only by the party denied the right which it claims Congress conferred on it. Every petitioner to the Commission is seeking a right claimed to be conferred by the Congress, and every denial of that right must necessarily be cast in the form of a negative order. If we have no jurisdiction because the denial must necessarily be cast in terms of negation, then every decision of the Commission adverse to such petitioners is final and not subject to review.

[2] The first question for our solution is whether by the provision, "if the Commission find the proposed disposition, consolidation, acquisition, and control will be consistent with the public interest, it *shall* approve the same" (Italic supplied) the Congress has conferred the *right* on the applying power companies to the approval of the Commission if, as claimed here, they make an affirmative showing of uncontroverted fact that the proposed consolidation "will be consistent with the public interest." This provision is not part of an act for the suppression of monopolies. On the contrary, public utility companies supplying electric light and power in many cases, if not most, are given monopolies of certain areas of distribution, and their rates controlled by public regulatory bodies. The declaration of policy of the act before us declares such distribution, if interstate, "is affected by a public interest," and the act provides for its regulation. No doubt evils may arise from overconcentration of power in consolidations of utility companies. It is equally apparent, on the other hand, that the public interest may best be served by economies arising from the diminution of competing units or the acquisition and immediate ownership of the physical properties of a subsidiary corporation by what had theretofore been its holding company.

Where such savings are made, they will be reflected in the regulated rates to the interested public. It may well be considered a duty on the part of a utility to seek such a beneficial consolidation—a service to the affected public interest in compliance with the policy of the act. We agree that the section conferred a substantive right to the Commission's approval, upon compliance with the showing required by the statute.

[3] It is also obvious that the denial of the right will be an order which loosely may be named a "negative order," in one of the several senses in which that term is used, but it is no more so than in an ordinary action at law where the judgment for the defendant is in a sense a negation of the prayer for relief. The right so conferred is positive, and, while denial of the application "may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms

declares *shall* be granted if only the conditions which the statute provides are found to exist." (Italic supplied.) Intermountain Rate Cases (1914) 234 U. S. 476, 490, 58 L. ed. 1408, 34 S. Ct. 986, 993; United States v. New River Co. (1924) 265 U. S. 533, 539, 68 L. ed. 1165, 44 S. Ct. 610, 612; Powell v. United States (1937) 300 U. S. 276, 284, 81 L. ed. 643, 57 S. Ct. 470, 474.

It is a final order denying a substantive right "of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and [which should be] supported by findings appropriate to the case," to which the petition for review "relates." Federal Power Commission v. Metropolitan Edison Co. (1938) 304 U. S. 375, 82 L. ed. 1408, 24 P.U.R.(N.S.) 394, 58 S. Ct. 963, 967. It is clear that the order is an affirmative decision that the right does not exist and, hence, it holds, the petition for it must be denied.

Nor is there any merit in the contention that the denial merely places the petitioners in the same status as before applying for the order. On the contrary, if the petitioners' contention regarding consistency with the public interest be correct, before the order, they were in possession of a right granted by Congress. After the order, they were deprived of it.

[4, 5] When such a claimed substantive right so definitively created by the act is denied, the petitioner is a "party aggrieved" within the specific provisions of § 313 (b). The review petitioned is to obtain our order (1) setting aside that of the Commission and (2) directing the Commission to give its approval of the consolidation.

Section 313 (b) authorizes this court to "affirm, modify, or set aside [the] order in whole or in part." We need not now decide whether we may "modify" such a denying order by making it an approval of the consolidation. It is sufficient for our jurisdiction that we may order it "set aside."

There is no merit in the Commission's contention that Congress has not given us such power because, after so setting aside the order and the return of the proceedings to the Commission, the situation is in statu quo ante the annulled order. So is the situation on a reversal of a judgment involving a new trial. The relief granted is not, as claimed by the Commission, a mere futility leading to repetitions of the Commission's identical order and successive identical annulments by us. It will not be presumed that the Board, any more than a trial court, will repeat in its proceedings an error of law so determined by the judicial tribunal reviewing the order under the reviewing provisions of the act creating the right.

The Commission cites no Supreme Court cases holding otherwise. In Procter & G. Co. v. United States (1912) 225 U. S. 282, 56 L. ed. 1091, 32 S. Ct. 761; Hooker v. Knapp (1912) 225 U. S. 302, 56 L. ed. 1099, 32 S. Ct. 769; Lehigh Valley R. Co. v. United States (1917) 243 U. S. 412, 61 L. ed. 819, 37 S. Ct. 397; and Piedmont & N. R. Co. v. United States (1930) 280 U. S. 469, 74 L. ed. 551, 50 S. Ct. 192, there are no specific rights definitely outlined in the statute and conferred on the petitioners

and the acts make no provision for a judicial review on the petition of the owner of an alleged right claimed to have been frustrated by the denial of its exercise. The distinction, in regard to a specific provision for review in the act itself, between these and similar cases and the case at bar is shown in United States v. Griffin (1938) 303 U. S. 226, 231, 82 L. ed. 764, 58 S. Ct. 601, 603. Also, these were cases in which the orders were negative in "*substance* as well as in form" (Italic supplied.) (Lehigh Valley R. Co. v. United States, *supra,* while here the order is affirmative in substance.

The order sought to be reviewed is a final order determining the nonexistence of the right, not a mere finding or report, as in United States v. Los Angeles & S. L. R. Co. 273 U. S. 299, 71 L. ed. 651, P.U.R.1927B, 357, 47 S. Ct. 413; United States v. Atlanta, B. & C. R. Co. (1931) 282 U. S. 522, 75 L. ed. 513, 51 S. Ct. 237, and Shannahan v. United States (1938) 303 U. S. 596, 82 L. ed. 1039, 58 S. Ct. 732; nor a mere notice of hearing, as in Federal Power Commission v. Metropolitan Edison Co. *supra.*

We are not in accord with the opinion of the second circuit in Newport Electric Corp. v. Federal Power Commission (1938) 97 F. (2d) 580, 25 P.U.R.(N.S.) 40, which, in our view does not give due weight to the definitive creation of the right to consolidate, nor to the specific provisions of the act itself granting the right to review to one aggrieved by the final order adjudicating its nonexistence. We are unable to distinguish, as does the second circuit, the right to review the question whether the proof shows "consistency with the public interest" from the decision that such right exists in American Sumatra Tobacco Corp. v. Securities and Exchange Commission (1937) 68 App. D. C. 77, 93 F. (2d) 236.

Respondent's motion to dismiss the petition should be denied.

MINNESOTA RAILROAD AND WAREHOUSE COMMISSION

Re Northwestern Bell Telephone Company et al.

[M-2429.]

Rates, § 558 — Telephones — Hand-set charge.

Specific provisions should be made for the ultimate elimination of the monthly differential for hand-set telephones, but proper protection should be afforded the companies so that this change will not create an excessive concentrated demand for this type of set.

[September 19, 1938.]

MINNESOTA RAILROAD AND WAREHOUSE COMMISSION

INVESTIGATION *on motion of Commission concerning extra charge for hand-set telephones; provision made for elimination of extra charge.*

By the COMMISSION: Upon investigation instituted by the Commission on its own motion concerning the propriety of the extra charge now in effect for the use of hand-set telephones the following facts are determined:

Hand sets were first offered and furnished to telephone subscribers in March, 1927, when the rate was 50 cents per month in addition to the regular rate for the particular class of service subscribed for. Among other things this charge was designed to insure orderly progress in changing from other types of instruments to the hand set, and to prevent a wholesale and wasteful replacement of other types of instruments by hand sets.

On order of the Commission the extra monthly charge has been reduced from time to time from the original amount of 50 cents per month for an indefinite period to the present rate of 15 cents per month for a 24-month period, which reductions have been ordered for the purpose of promoting installations of the hand-set type of equipment without forcing a too rapid replacement of good, usable desk- and wall-set instruments.

In issuing its orders of November 13, 1933, and January 21, 1937, the Commission indicated that the monthly charge should ultimately be entirely eliminated and upon reëxamination of the matter it now appears that the proportion of hand-set type of instrument is approaching the point where it should be considered as a standard type of instrument and furnished without extra charage.

It also appears that a definite announcement of the elimination of the monthly charge at this time will have the effect of stimulating the rate of placement of such instruments to such extent that the development on December 31, 1939, will substantially exceed the present development.

We believe, in view of these facts and the length of time during which the monthly charge has been made and in spite of the fact that the telephone companies contend the development should be higher before the charge is ordered removed, that specific provisions should be made at this time for the ultimate elimination of the monthly differential for these sets, but that proper protection should be afforded the companies so that this change will not create an excessive, concentrated demand on the telephone companies for this type of set.

After due consideration of all matters herein contained and being fully advised in the premises, the Commission finds that the present charge of 15 cents per month applicable for a period of twenty-four months should be entirely discontinued as of December 31, 1939, and sufficient cause for this order appearing,

It is, therefore, *ordered,* that effective December 31, 1939, the present extra charge for hand sets of 15 cents per month now made by the Northwestern Bell Telephone Company and

the Tri-State Telephone and Telegraph Company in the state of Minnesota, be discontinued with respect to such hand sets, the charge for which shall not have already been terminated by reason of the twenty-four months' limit.

It is *further ordered*, that from June 1, 1939, to December 31, 1939, for each hand set installed replacing another instrument, a minimum charge of $1 shall be made in lieu of the monthly charge of 15 cents. After December 31, 1939, no monthly differential shall apply for hand-set service, such sets shall be charged for as though a desk instrument were furnished and no charge other than the service connection and change of instrument charges regularly applicable for service involving other types of instruments shall be made.

MINNESOTA RAILROAD AND WAREHOUSE COMMISSION

H. J. Stolee, Manager of Lutheran Bible Institute

v.

Alexandria Telephone Company

[M-2411.]

Monopoly and competition, § 84 — Telephone company — Invasion of territory.

Entry of a telephone company for the purpose of furnishing local, rural, or toll telephone service to the inhabitants of territory located within the exchange area boundaries of another telephone company, ready and willing to install and render reliable and adequate service, would be contrary to the provisions of § 5299, Mason's Minn. Stats. 1927.

[August 31, 1938.]

APPLICATION *for extension of telephone service; dismissed.*

APPEARANCES: A. N. Fancher, Supervisor of Telephones, Saint Paul, for the Commission; H. J. Stolee, Manager, Lutheran Bible Institute, Minneapolis, for the petitioner; N. A. Steidl, Secretary, Carlos, and J. C. Crowley, Secretary, Minnesota Telephone Association, Saint Paul, for Central Telephone Company.

By the COMMISSION: Pursuant to notice, duly given, the above-entitled matter came on for hearing in the village hall at Carlos, Minnesota, at 1:30 o'clock in the afternoon, June 21, 1938.

It appears that the Lutheran Bible Institute, with headquarters at 1619 Portland avenue, Minneapolis, Minne-

sota, is building a summer school on the west shore of Lake Carlos, its location on the lake being within the exchange area of the Central Telephone Company of Carlos, Minnesota.

The Alexandria Telephone Company renders telephone service in the city of Alexandria and rural territory adjacent thereto, its exchange boundary terminating approximately 3 miles south of the summer school. The Carlos and Alexandria exchanges are connected by direct trunk lines and all the subscribers of the Central Telephone Company are listed in the directory of the Alexandria Telephone Company.

The management of the Lutheran Bible Institute contends that telephone service from Alexandria is a necessity, as its students and patrons arrive in that city by bus or train and all its business transactions for the school are centered there. That telephone service through the Carlos exchange of the Central Telephone Company would be confusing to the students and patrons arriving in Alexandria and wishing to contact the school by telephone.

Objection was also made to the toll charge between Carlos and Alexandria. The Central Telephone Company objects to the Alexandria Telephone Company serving this territory as the Central Telephone Company has its lines constructed here and is now serving a boys' camp situated between the summer school and Alexandria. The officers of the Central Telephone Company signified their willingness to serve the summer school and there was no evidence that the service would not be reliable and adequate.

This case is similar in many respects to Commission's Docket M–2134, W. J. Smith v. United Telephone Company, decided April 21, 1931. Mr. Smith resided on a farm about 90 rods outside the exchange area of the United Telephone Company of West Concord and in the exchange area of the Claremont Telephone Company. He requested the United Telephone Company to construct its lines to his farm and furnish him telephone service. This it refused to do, claiming it was contrary to the provisions of § 5299, Mason's Minn. Stats. 1927, which reads in part as follows:

"No lines or equipment shall be constructed or installed for the purpose of furnishing local, rural, or toll telephone service to the inhabitants or telephone users in any locality in this state, where there is then in operation in the locality or territory affected thereby another telephone company already furnishing such service, without first securing from the Commission a declaration, after a public hearing, that public convenience requires such proposed telephone lines or equipment. . . ."

Thereupon Mr. Smith appealed to this Commission. After due hearing the Commission issued its order M–2134 in which it found that:

"West Concord is the trading point of the petitioner herein, and that he is engaged in business at West Concord in addition to operating several farms in said vicinity and that in order to reach the trading territory of the West Concord Telephone System he would be required to first call Claremont and then switch his calls to West Concord and pay a switching charge of 10 cents for each call, and that by reason of

this switching necessity and the poor condition of the Claremont Telephone Company's lines there would of necessity be, at times, considerable delay in getting the respective parties."

The Commission ordered the United Telephone Company to make the installation for Mr. Smith. The Claremont Telephone Company filed an appeal in the district court, from this decision. The court's finding follows:

"That at the time of the making and filing of the petition herein the Claremont Telephone Company had its lines and equipment constructed and installed for the purpose of furnishing local, rural, and toll telephone service to the inhabitants and telephone users in the locality and territory affected thereby.

"That the order appealed from is arbitrary, unjust, unreasonable, and not supported by the evidence."

After due consideration of all matters herein contained and being fully advised in the premises, the Commission finds:

1. That the petitioner's summer school is located within the exchange area boundaries of the Central Telephone Company.

2. That the Central Telephone Company of Carlos, Minnesota, is ready and willing to install and render reliable and adequate telephone service to the petitioners herein.

3. That for another telephone company to enter this territory for the purpose of furnishing local, rural, or toll telephone service to the inhabitants would be contrary to the provisions of § 5299, Mason's Minn. Stats. 1927.

It is therefore *ordered*, that the petition of H. J. Stolee, manager of the Lutheran Bible Institute, for telephone service, at its summer school on Lake Carlos, Douglas county, Minnesota, from the Alexandria Telephone Company, be dismissed without prejudice.

CONNECTICUT PUBLIC UTILITIES COMMISSION

Benjamin M. Leipner et al.

v.

Connecticut Railway & Lighting Company

[Docket No. 6592.]

Rates, § 156 — Factors considered — Safety of service — Adequacy of service.

1. Safety and adequacy of service must be considered in regulating motor bus rates, since either one or both can be attained only if a utility is permitted to earn sufficient to pay all operating expenses, including taxes and depreciation, and some reasonable margin above this amount to maintain its credit should additional financing be needed, p. 471.

Rates, § 159 — Factors considered — Attraction of business — Rate reduction.

2. A reduction in rates of a motor bus transportation company in order to induce the maximum amount of riding should not be ordered when the company is making no more than a fair return and where it is doubtful that a reduced fare would increase the use of public transportation, p. 472.

Rates, § 69 — Powers of Commission — Managerial matters — Experimental rate reduction.

3. The Commission should not exercise its authority to recommend a reduction in motor bus fares for a trial period for purpose of experiment when this might be disastrous to the company and thereby constitute not only erroneous judgment but also an invasion of the field of management reposed by law in the company, p. 473.

[August 24, 1938.]

PETITION *for reduction in motor bus fares; denied.*

By the COMMISSION: On November 5, 1937, the Commission received the following petition from Benjamin M. Leipner and others for a reduction of bus fares of the Connecticut Railway and Lighting Company in the city of Bridgeport:

"To the Honorable Public Utilities Commission of the State of Connecticut, State Office Building, Hartford, Conn.

"PETITION FOR A REDUCTION OF BUS FARES IN THE CITY OF BRIDGEPORT.

"Your petitioners respectfully represent:

"1. That they are patrons and customers of the Connecticut Railway and Lighting Company, which operates a bus line system within the limits of the city of Bridgeport.

"2. That the Connecticut Railway and Lighting Company is a corporation chartered by the state of Connecticut, with authority to operate an electric street railway system and bus lines within the limits of said city.

"3. That the Connecticut Railway and Lighting Company has eliminated the operation of its street railway system and now operates a bus line system within the limits of the city of Bridgeport.

"4. That the Connecticut Railway and Lighting Company, under authority of your Honorable Commission, put into effect upon its system within said city, a flat 10-cent fare, and subsequently said Connecticut Railway and Lighting Company did put into effect a ruling whereby it sold to the public so-called tokens at the rate of three for 25 cents.

"5. That said flat 10-cent fare and said price of three tokens for 25 cents are excessive and unreasonable in so far as the lines within the city of Bridgeport are concerned.

"6. Your petitioners, therefore, pray that your Honorable Commission will grant a hearing to be held in or near the city of Bridgeport, under the provisions of §§ 3597 and 3600 of the Gen. Stat. Revision of 1930, on so much of the foregoing petition

as relates to the price of fare rates, charged by the said Connecticut Railway and Lighting Company, and will order and prescribe a just and reasonable maximum rate and charge to be made therefore by the Connecticut Railway and Lighting Company.

"Dated at Bridgeport, Connecticut, this 5th day of October, A. D. 1937.

"Signed by Benjamin M. Leipner and others."

Hearing was held in this matter at Bridgeport on December 16, 1937, and continued at Hartford on April 18, 1938, and again at Hartford on May 25, 1938, when it was concluded with opportunity to the parties in interest to file briefs, the date for which was extended, upon request of the parties, until July 9, 1938, upon which date the petitioners and the company filed briefs.

It appeared in evidence that on August 1, 1906, the Connecticut Railway and Lighting Company leased all of its railway properties and its connecting lines to The Consolidated Railway Company for 999 years, and thereafter the Connecticut Railway and Lighting Company ceased to be an operating company. The Consolidated Railway Company was merged with The New York, New Haven and Hartford Railroad Company on May 31, 1907, and on February 28, 1910, the last-named company subleased the properties included in the Connecticut Railway and Lighting Company's system to The Connecticut Company, its wholly owned subsidiary. The New Haven Railroad continued as guarantor of the rental due the Connecticut Railway and Lighting Company under the original lease of August 1, 1906.

It further appeared that on October 23, 1935, The New York, New Haven and Hartford Railroad Company filed a petition for reorganization under § 77B of the Federal Bankruptcy Act, and on October 31, 1935, The Connecticut Company also filed a petiton for reorganization under § 77B. As a result of the reorganization proceedings the 1906 and 1910 lease and sublease were disaffirmed and rejected by The Connecticut Company and by The New Haven Railroad Company under authority of the United States district court for the district of Connecticut.

Pursuant to petition of October 29, 1936, to the district court the real and personal property of the Connecticut Railway and Lighting Company were restored to it by order of the said district court as of November 16, 1936, and the Connecticut Railway and Lighting Company entered into possession of its property on November 16, 1936. On November 10, 1936, the Commission approved the transfer from The Connecticut Company to the Connecticut Railway and Lighting Company of all rights of the former to operate sundry motor bus routes under the authority of the Commission within the franchised territory of the Connecticut Railway and Lighting Company, which routes The Connecticut Company had theretofore operated as sublessee of the Connecticut Railway and Lighting Company.

Subsequently on February 1, 1937, the Commission issued to the Connecticut Railway and Lighting Company Certificate No. 219 thereby confirming its temporary order dated

November 10, 1936, and making said order permanent.

The chief claim of the petition in the instant case was that the present rates of fare of the Connecticut Railway and Lighting Company in effect within the Bridgeport district, namely, a 10-cent fare with a special rate of three tokens for 25 cents, both including transfer privileges, were unreasonable in so far as they applied to the lines of the company within the city of Bridgeport, and the petition requested a hearing by the Commission and an order to prescribe a just and reasonable maximum rate of fare.

At the first hearing in Bridgeport it was arranged that a study and report should be made jointly by accountants representing the petitioners, the city, and the Commission.

Such a joint study was made by accountants of the petitioners, the city, and the Commission, and a joint report dated April 1, 1938, concurred in and signed by all three accountants, was submitted in evidence at the April hearing.

This report of the accountants clearly indicates that the company's records are systematically maintained and the financial transactions are properly recorded therein in accordance with this Commission's prescribed accounting rules and regulations.

This report was confined to a study of the Bridgeport division of the company which comprised its Bridgeport bus lines and those extending to Stratford, Fairfield, Easton, Norwalk, Milford, Derby, and Devon. The general expenses, which also applied to the company's other operating districts, were apportioned to the Bridgeport district on the basis of the ratio of the operating revenues of this district to the total operating revenues.

The report included an inventory showing the original cost of all of the property purchased by the Connecticut Railway and Lighting Company subsequent to November 16, 1936, and the replacement value of busses and other property taken over from The Connecticut Company as of November 16, 1936.

It should be noted that the value reported by the accountants excludes entirely all of the old street railway equipment and nothing was included by them for franchise or going value. They considered only the valuation of the company's property and equipment used by the company in furnishing motor bus service.

The report presented an estimate of operating income for a 12-month period, based on the company's actual operating revenues and expenses for the six months' period ending December 31, 1937, while it was under bus operation exclusively in the Bridgeport district.

The company did not submit any evidence as to replacement cost of its used and useful property, nor did it offer testimony as to its fair value, and the Commission will not undertake to make a determination of its fair value since the valuation figures in the joint report indicate the original cost of the property which was acquired subsequent to November 16, 1936, and the remainder of the used and useful property, taken over from The Connecticut Company, evaluated by the company at the estimated replacement cost.

For the purposes of the Commis-

sion in this case it does not appear necessary to make any specific appraisal of the property or to determine its fair value, and in considering the company's rate of return in this case the company's valuation of approximately $1,691,600 appears not to be unreasonable.

It appeared from the report that the estimated operating income for a year would be about $60,000, which represents a return of approximately 3½ per cent on the company's valuation in motor busses, equipment, and buildings devoted exclusively to bus operation in Bridgeport.

The petitioners with the mayor of Bridgeport and several other interested parties contended, at the first hearing, that the rate of fare should be materially reduced, to as low as 5 cents it was suggested, in the expectation that the revenues of the carrier would be materially increased. From the joint report it appeared that if the rates were so reduced to 5 cents the company would probably suffer so much loss of revenue there would be a substantial deficit from its Bridgeport district operations. After the results of the study and joint report were available the petitioners, at the April hearing, admitted that a reduction in the rate to as low as 5 cents would not be warranted, but they still contended that a rate lower than the present rate should be instituted as a matter of experiment.

At the April hearing the petitioners also introduced in evidence a report prepared by their accountant alone and not concurred in by the other two accountants. This separate report of the petitioners differed from the joint accounting report in that the petitioners' accountant excluded from his report the company's operations on certain bus routes extending beyond the city limits of Bridgeport. On the elimination of these so-called outside routes the petitioners' suggestion for a lower rate of fare is based. The report in question assumed that these lower rates would apply only to the company's routes within the city of Bridgeport and including Stratford and Fairfield but excluding all other routes in the Bridgeport division of the company's operations extending beyond the city of Bridgeport. Thus the patrons in the Bridgeport area using certain suburban and interurban routes would be subject to a higher rate of fare than those using other routes entirely within Bridgeport.

The petitioners' brief, submitted subsequent to the close of the hearings, made further claim for reduction of the rate of fare upon the basis of benefit to the economic and social life in the community.

[1] In its regulation of a public utility a Commission should consider safety of service as first in importance, and, second, the adequacy of service. While neither of these features were at issue in this case they must properly be considered by the Commission since either one or both can only be attained if a utility is permitted to earn sufficient to pay all its operating expenses, including taxes and depreciation, and some reasonable margin above this amount to maintain its credit should additional financing be needed. A utility which cannot at least produce earnings adequate to meet these requirements surely will be unable to favorably affect the

economic and social life of the community.

Though there was testimony as to crowding of busses, it did not appear that this was of common occurrence even during regular peak-load periods, and it is well known that in extraordinary peak-load periods transportation companies are not always able to meet an unexpected flow of travel due to extreme weather or other unusual conditions and especially if this occurs at a time when the normal travel is of peak-load character. Any such specific complaints should be brought to the attention of the company or the Commission for remedial steps if such are practicable.

It is within the knowledge of the Commission that from the time the properties of the company were taken over for operation by its owners the management has been progressive in changing from trolley to bus operation, has had an excellent record as to safety of its passengers, has been considerate in relation to its patrons, and it has been making studies of ways and means for improving the conduct of its business, including the general question of rates of fare, not only in the Bridgeport area but throughout the territory it serves.

It is obvious from the joint report of the accountants that the company cannot be said to be earning more than a fair return upon its investment in its operating property devoted to motor transportation service within the Bridgeport district, as heretofore noted.

[2] In the conduct of mass passenger transportation by a common carrier there is some rate of fare which will induce the maximum amount of riding by the public and at the same time produce operating income sufficient to meet the proper needs of the company. The pronouncement of this principle might seem to warrant the Commission in ordering an experiment with a lower rate of fare in this case, but it is well known that the development of and improvements in the types of automobile commonly used in private transportation and the lowered purchase cost and operating expense thereof has produced a convenient method of transportation which was not available when city and interurban transportation by trolley cars was in use. The increased use of such private motor transportation has deprived the public transportation companies of much passenger traffic they otherwise would have enjoyed. It is this competitive situation that is more responsible for the present low earning power of common carriers of passengers generally than any other factor.

While a reduction of a utility's rates generally results in an increased use of the service, and might in this case, it is very doubtful that a reduced fare on the company's lines would increase the use of public transportation in Bridgeport, in fact it is quite probable that any increased use of the company's bus lines by the riding public would be due to passengers drawn to it from other competitive independent bus lines and who now continue to use the latter by reason of the generally lower rates of fare, such lower rates being possible to maintain because each of these independents generally operates only one line which is favorably situated with respect to resi-

dential and industrial areas of the city, resulting in the operation of busses with high load factor, also because they do not issue transfers and furthermore enjoy a favorable differential in the labor cost of conducting transportation.

The company's revenues have declined since January 1, 1938, and this is an added reason against any fare adjustment which might further reduce the revenues and imperil the company's financial condition.

[3] In consideration of all the evidence in this case, the Commission cannot fairly order the company to make any reduction in its rates of fare in the Bridgeport district. Furthermore, while it is within the authority of the Commission to recommend to the company a reduction in the present rate of fare for a trial period for purpose of experiment, to exercise that discretion at the present time and under the facts appearing in this proceeding might be disastrous to the company and thereby constitute not only erroneous judgment but also an invasion of the field of management reposed by law in the company.

An experimental period of operation under any rates lower than now obtaining might so adversely affect the company's earnings as to jeopardize the safety and adequacy of its service and it appears that at this time the company would not be warranted in entering upon a voluntary experiment with lower rates of fare.

It might well be noted from data compiled by the American Transit Association that the rate of fare now in effect in Bridgeport is the prevailing rate of fare in cities throughout the country, comparable in size to Bridgeport, and that regulatory bodies which have authorized reduced rates of fare in recent years for purpose of experiment have been generally led to restore the original rates at the end of the trial period due to the failure of the experiment.

The petition, therefore, should be and is hereby denied.

NEW HAMPSHIRE SUPREME COURT

H. P. Welch Company

v.

State

[No. 2966.]

(— N. H. —, 199 Atl. 886.)

Constitutional law, § 21 — Equal protection — Federal and state Constitutions.

1. The Fourteenth Amendment to the Constitution of the United States adds nothing to the rights and liberties of the citizens of New Hampshire, for the state Constitution secures to every person within its jurisdiction

all the rights guaranteed to citizens of the United States by that amendment, p. 477.

Constitutional law, § 21 — Equal protection — Legislative classifications.

2. Not every legislative classification is within the ban of the Federal and state constitutional limitations relating to discrimination and equal protection, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment, p. 477.

Motor carriers, § 8 — Powers of state — Class legislation.

3. A state, in the interest of highway safety, may not only single out carriers for hire by motor vehicle from such carriers in general and apply to the former regulations from which the latter are exempt, but it may also create classifications among carriers for hire based upon the nature and extent of their use of the highways, p. 478.

Motor carriers, § 6 — Powers of state — Truck drivers — Hours of service.

4. The state has power to protect the users of the highways of the state from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue and may limit the permissible number of hours of continuous service of motor truck drivers, p. 478.

Motor carriers, § 8 — Powers of state — Motor truck operators — Hours of service — Class legislation.

5. The state, in limiting the hours of continuous service of motor truck drivers, may apply such regulation to trucks used by common or contract carriers while exempting a truck driver transporting goods manufactured by him or his employer, if the legislature is in possession of facts justifying its classification, p. 478.

Evidence, § 3 — Judicial notice — Conditions of employment — Motor carriers.

6. The court cannot take judicial notice of the conditions of employment of truck drivers not engaged in operation for common or contract carriers, p. 478.

Motor carriers, § 8 — Powers of state — Motor vehicle operators — Hours of service.

7. A statute limiting the hours of continuous service of drivers of motor trucks operated for common or contract carriers is not unconstitutional on the ground that it sets up an invalid classification by reason of the fact that it exempts from the provisions of the act motor vehicles not principally engaged in the transportation of property for hire, p. 479.

Interstate commerce, § 38 — Powers of state — Hours of service of truck drivers.

8. A state act limiting the hours of continuous service of truck drivers operating for common or contract carriers remains in full force and effect until the effective date of Interstate Commerce Commission rulings upon the subject under the Federal Motor Carrier Act and is not superseded by enactment of the Federal act, p. 480.

Motor carriers, § 11 — Powers of Commission — Rules and regulations.

9. The Commission has power to enforce the provisions of the state law regulating motor carriers by promulgating appropriate rules and regulations, although the act does not in terms give the Commission authority to prescribe rules and regulations, p. 482.

Motor carriers, § 11 — Power of Commission — Rules and regulations — Hours of truck drivers — Records.

10. Promulgation by the Commission of a rule requiring that each truck driver shall keep a record of his hours of service and that copies of such records shall be kept by his employer, and also providing that these records shall be filed with the Commission at the end of each month, does not amount to an unconstitutional usurpation of legislative power by the Commission, since the rule is well calculated to aid the Commission in the enforcement of the statute limiting the hours of service of motor truck drivers, and this is a valid exercise by the Commission of the powers given to it by statute, p. 482.

Appeal and review, § 37 — Presumption — Basis for Commission action.

11. The court, in reviewing a Commission order suspending the operating authority of a motor carrier who has violated a statute and also the rules of the Commission, will not assume that the Commission has disregarded the clear wording of the statute by imposing the suspension for a violation of its orders rather than for a violation of the statute, p. 483.

Procedure, § 30 — Findings — General finding — Special facts.

12. The established principle that, in the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it is applicable to the findings of the Commission when acting judicially, p. 483.

Motor carriers, § 30 — Motor truck drivers — Hours of service — Interstate carrier.

13. The fact that some of the hours of service which went to make up the statutory limit beyond which motor truck drivers were not permitted to operate continuously occurred outside the state is not material in determining whether a statutory limitation on continuous hours of service has been violated; there is no violation of the statute until an operator has reached the limit of hours of operation allowed and the offense of operating thereafter could findably have occurred within the state, p. 484.

Evidence, § 11 — Burden of proof — Matters within knowledge of party.

14. A claim that evidence in a Commission proceeding is deficient is unfounded when relating to matters peculiarly within the knowledge of a company complaining of such deficiency, since if such facts existed it was the province of the company to offer evidence of their existence, p. 484.

[June 1, 1938.]

APPEAL *from order of Commission suspending operating authority of motor truck company for violation of limitations on hours of service of truck drivers; appeal dismissed. For decision by Commission, see 22 P.U.R.(N.S.) 449.*

Appeal, from an order of the Public Service Commission suspending for five specified days "any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in motor vehicles between points within this state, either as a common carrier or contract carrier."

The H. P. Welch Company, for convenience hereinafter referred to as the company, is a Massachusetts corporation engaged in the business of transporting property for hire over the public highways of this and other states. In the conduct of its business it owns and operates a fleet of motor trucks, eighteen of which were registered with the Public Service Commission under Laws 1933, Chap. 106, §§ 2, 3, as both common and contract carriers for the year 1936, and twenty of which were so registered for the year 1937. Computed on the basis of tonnage approximately 99 per cent of its business during those years was in interstate commerce and the remaining 1 per cent was in intrastate commerce.

On April 13, 1937, the Public Service Commission ordered the company to "show cause why its common and contract carrier certificates should not be suspended or revoked," and set May 6, 1937, as the date for hearing. This order recited violations by the company of the provisions of Laws 1933, Chap. 106, § 8, "by requiring or permitting a driver to operate after he has been continuously on duty for more than twelve hours." It also recited violations by the company of rule 4N of Circular No. 2 of the Commission's administrative rulings "by requiring or permitting a driver to operate without a record on the vehicle of his hours of service, and by failure to file with the Commission the 'Hours of Service Record' of each driver." At the hearing held pursuant to this order the company appeared by counsel and was given full opportunity to present its evidence and its arguments.

On December 11, 1937 (22 P.U.R. (N.S.) 449) the Public Service Commission filed its report and the order of suspension quoted above. By stipulation the order was suspended pending the outcome of this appeal.

Such further facts as are deemed material are stated in the opinion.

APPEARANCES: Lawrence I. Duncan and Robert W. Upton, both of Concord, for plaintiff; Dudley W. Orr, of Concord, for the state.

WOODBURY, J.: The plaintiff does not contend that the legislature in enacting Laws 1933, Chap. 106, as amended by Laws 1933, Chap. 169, intended to impose direct regulations upon interstate commerce as such, nor does it contend that the provisions of these statutes operate either to discriminate against such commerce or to impose an undue or unreasonable burden upon it. Southern R. Co. v. King (1910) 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594. Neither does the company challenge the doctrine established in Hendrick v. Maryland (1915) 235 U. S. 610, 622, 59 L. ed. 385, 35 S. Ct. 140, 142, and consistently adhered to ever since (South Carolina State Highway Dept. v. Barnwell Bros. [1938] 303 U. S. 177, 82 L. ed. 734, 58 S. Ct. 510, and cases cited), to the effect that "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others." As summarized in its brief the plaintiff's appeal is "upon the ground that the statute denies to it the equal protection of the laws guaranteed by

the Bill of Rights of the Constitution of New Hampshire and by the Fourteenth Amendment to the Constitution of the United States, upon the ground that the statute and Rule 4N, as applied to interstate commerce, have been superseded by the 'Motor Carrier Act, 1935' [49 USCA § 301 et seq.], upon the ground that Rule 4N and the orders of the Commission relating thereto exceed the powers and authority of the Commission, and upon the further grounds that the evidence does not establish the company's responsibility for the alleged violations, and that the findings and conclusions of the Commission set forth above are unwarranted by the evidence."

The statute under consideration applies only to those transporting property for hire, either as common or contract carriers as the latter term is defined in the act, and it applies to them only in so far as they operate motor vehicles over the public highways between points within this state. It does not apply to "those transporting products of their own manufacture or labor," and, in addition, § 4 of the act specifically exempts from its provisions "motor vehicles not principally engaged in the transportation of property for hire," and "motor vehicles operating exclusively within the limits of a single city or incorporated town or within 10 miles of the limits thereof or motor vehicles operating beyond such 10-mile limit on occasional trips, not exceeding two trips in any 30-day period."

The company contends "that these exceptions and exemptions are discriminatory, and deny to it the equal protection of the laws guaranteed by the Constitution of New Hampshire and the Fourteenth Amendment to the Constitution of the United States."

[1, 2] Under Part 1 of the Constitution of this state and under the Fourteenth Amendment to the Constitution of the United States persons similarly situated are guaranteed similarity of treatment. In this respect the Fourteenth Amendment "adds nothing to the rights and liberties of the citizens of this state" (State v. Pennoyer [1889] 65 N. H. 113, 115, 18 Atl. 878, 880, 5 L.R.A. 709), "for our Constitution secures to every person within its jurisdiction all the rights guaranteed to citizens of the United States by that amendment." State v. Aldrich (1900) 70 N. H. 391, 47 Atl. 602, 85 Am. St. Rep. 631. Not every legislative classification is within the ban of these constitutional limitations however. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." Barbier v. Connolly (1885) 113 U. S. 27, 32, 28 L. ed. 923, 5 S. Ct. 357, 360. Or, as stated in Re Opinion of the Justices (1931) 85 N. H. 562, 564, 154 Atl. 217, 221, "Classification to be valid must reasonably promote some proper object of public welfare or interest and may not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature." Legislative classification to be constitutional must be based upon some substantial foundation, it may not be arbitrary, it must be germane to the purpose of the law.

Woolf v. Fuller (1934) 87 N. H. 64, 72, 174 Atl. 193, 94 A.L.R. 1067.

[3] Recent decisions of the Supreme Court of the United States sustain the validity under the Fourteenth Amendment of classifications substantially similar to those made in the statute under consideration. Under these decisions a state, in the interest of highway safety, may not only single out carriers for hire by motor vehicle from such carriers in general and apply to the former regulations from which the latter are exempt, but it may also create classifications among carriers for hire based upon the nature and extent of their use of the highways. Packard v. Banton (1924) 264 U. S. 140, 68 L. ed. 596, 44 S. Ct. 257; Bekins Van Lines v. Riley (1929) 280 U. S. 80, 74 L. ed. 178, 50 S. Ct. 64; Alward v. Johnson (1931) 282 U. S. 509, 75 L. ed. 496, 51 S. Ct. 273, 75 A.L.R. 9; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, P.U.R. 1932E, 429, 52 S. Ct. 595, 81 A.L.R. 1402; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, P.U.R. 1932E, 157, 52 S. Ct. 581; Hicklin v. Coney (1933) 290 U. S. 169, 78 L. ed. 247, 4 P.U.R.(N.S.) 299, 54 S. Ct. 142.

In the Continental Baking Company Case, *supra*, at p. 439 of P.U.R. 1932E, the court said: "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative" And, in Sproles v. Binford, *supra*, at p. 168 of P.U.R. 1932E, the court said: "There is no constitutional requirement that regulation must reach every class to which it might be applied—that the legislature must regulate all or none. . . . The state is not bound to cover the whole field of possible abuses. . . . The question is whether the classification adopted lacks a rational basis."

These decisions establish that classifications of the sort here under consideration do not lack a "rational basis," and they are conclusive upon us on the question of the validity of Laws 1933, Chap. 106, under the Fourteenth Amendment to the Federal Constitution. In addition these decisions "are authority to be weighed" on the question of the validity of that statute under the Constitution of this state. State v. Pennoyer, *supra*.

[4–6] One of the expressed and evident purposes of the statute before us is to protect the users of the highways of this state from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue. Undoubtedly this is a legitimate exercise of the state's police power, and, while it is true that a fatigued truck driver transporting goods manufactured by him or his employer is as great a menace upon the highway as such a driver transporting property for hire, it does not follow that in the interest of highway safety no distinction may be drawn between them on the basis of the industry in which they are engaged. The legislature may well have been in the possession of facts indicating a practice on the part of carriers for hire to employ their drivers for long hours, while it may also have had before it evidence that such was not the practice

among the owners of trucks used for other purposes. We may take judicial notice of the fact that trucks not used by common or contract carriers create a substantial amount of traffic over the highways but we cannot take judicial notice of the conditions of employment in those industries. In other words, instances of the employment of truck drivers for excessive hours may occur only sporadically and then under circumtances of emergency in industries of this latter sort, while excessive hours of service may be a regular practice in the business of transporting goods for hire. At least, upon the basis of facts judicially known, we cannot say that the existence of such a situation could not have been found by the legislature, and under these circumstances its classification must be allowed to stand. South Carolina State Highway Dept. v. Barnwell Bros. *supra.*

[7] Similar considerations support the exemption from the provisions of the act of "motor vehicles not principally engaged in the transportation of property for hire." Excessive hours of employment on vehicles so used may either be of such infrequent occurrence that regulation of them is unnecessary, or else it may have been the legislative judgment that regulations adequate to control persons regularly engaged in the business of common and contract carriers for hire by motor truck would bear upon persons not regularly so engaged with a weight disproportionate to any possible benefit which might thereby accrue to the public. Whether, under our Constitution, frequency and extent of operation may alone provide a sufficient basis for classification we do not undertake to say, but they may properly be supporting reasons therefor when, as here, some other reason appears in conjunction with them.

In the case of local operations, in which from necessity the periods of driving must be frequently interrupted, it may well be that fatigue does not develop as rapidly or become as great as it does in a driver subjected to the monotony incident to long and uninterrupted trips. For this reason the legislature may reasonably have decided that local operations did not require any regulation at all while regulation was imperative as to operations covering greater distances.

We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a "rational basis," or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional.

The case principally relied upon by the company (Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, P.U.R. 1931C, 448, 455, 51 S. Ct. 582), is not in point. In that case the court was called upon to consider a state statute purporting to regulate carriers of property for hire by motor trucks in the interest of highway safety which excluded from its operation motor vehicles used to transport agricultural and dairy products and fish and oysters. In holding this classification arbitrary, without relation to the purpose of the act and hence unconstitutional, the court said: "But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm

products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The distinction between the case cited and the one at bar is obvious. In the former, classification is based upon the kind of goods carried, and that without relation to the nature of those goods as inflammable, explosive, bulky, or otherwise likely to create a hazard when in transit over the highway. In the case before us, on the other hand, the classification is upon the basis of the nature of the business of the owner of the vehicle and, as appears above, a classification upon this basis is not necessarily an arbitrary or unreasonable one. The above distinction between the Smith Case and cases similar to the one before us was fully elaborated in Aero Mayflower Transit Co. v. Georgia Pub. Service Commission (1935) 295 U. S. 285, 79 L. ed. 1439, 9 P.U.R.(N.S.) 382, 55 S. Ct. 709.

[8] The company's next contention is to the effect that the state statute has been superseded by the Federal Motor Carrier Act, 1935, 49 Stat. 543, 49 USCA § 301 et seq.

Briefly stated the record of events is as follows: The state statute under consideration became law on May 6, 1933. The administrative rulings, Circular No. 2, referred to above became effective on August 1, 1936. The violations thereof and of the statute for which the company's registration certificates were suspended occurred during the latter part of 1936 and the first three months of 1937.

The Federal Motor Carrier Act, 1935, became law in August 1935, and in that act, § 204 (a) (2), 49 USCA § 304 (a) (2), it is provided that the Interstate Commerce Commission "may establish reasonable requirements with respect to . . . maximum hours of service of employees." Pursuant to this permissive power that Commission held hearings at various places during the year 1937, and on December 29th of that year rendered its decision. In this decision it established maximum hours of service for employees of both common and contract carriers for hire by motor vehicle which are substantially similar to those established in Laws 1933, Chap. 106, § 8, and in addition it provided for the keeping and filing of records of service by such employees which are also substantially similar to the provisions of rule 4N mentioned above. By order of the Interstate Commerce Commission its requirements in the above respects were not to become effective until July 1, 1938.

The violations of the state act for which the company was put upon trial occurred, therefore, during the interval between the passage of the Federal act and action thereunder by the Interstate Commerce Commission. The question presented is whether or not, during that time, the operation of the state statute, as it affected interstate commerce, was suspended by the Federal act.

Generally stated the rule is that reasonable nondiscriminatory state action under the police power may indirectly affect interstate commerce, but it may affect such commerce only until Congress in the exercise of its plenary power takes action which covers the field. Oregon-Washington

R. & Nav. Co. v. Washington (1926) 270 U. S. 87, 70 L. ed. 482, 46 S. Ct. 279. Both the state and the Federal government cannot occupy the same field at the same time (University Overland Express v. Griffin [1938] — N. H. —, 200 Atl. 390, and cases cited), and the time when Congress preëmpts the field depends upon its intention.

Applying this rule of congressional intention the Supreme Court of the United States in Northern P. R. Co. v. Washington ex rel. Atkinson (1912) 222 U. S. 370, 56 L. ed. 237, 32 S. Ct. 160, and Erie R. Co. v. New York (1914) 233 U. S. 671, 58 L. ed. 1149, 34 S. Ct. 756, 52 L.R.A. (N.S.) 266, Ann. Cas. 1915D, 138, held that state regulations of the hours of service of train crews, in so far as they applied to employees upon trains moving in interstate commerce, were suspended upon the date of passage of a Federal statute upon the subject. This Federal statute was passed on March 4, 1907, 45 USCA § 61 et seq., but by its terms it was not to take effect until one year later. In holding that the state statutes were ineffective as to interstate commerce during that year the court said that Congress had manifested its intention to enter the field when it enacted the statute and that by postponing its effective date for a year it manifested an intention that the field should remain without regulation during that time.

The above cases are strongly relied upon by the company but we do not consider them to be in point. The reason for this is that the Hours of Service Act (34 Stat. 1415, 45 USCA § 61 et seq.), differs radically from the Motor Carrier Act, 1935. In the former Congress established the maximum hours of service permitted and provided that the act should become operative one year from the date of its passage. In the latter Congress gave the Interstate Commerce Commission permission to fix the maximum hours of service and provided no date upon which the Commission was required to put its rulings into effect. The cases establish that this difference is a material one.

In Missouri P. R. Co. v. Larabee Flour Mills Co. (1909) 211 U. S. 612, 623, 53 L. ed. 352, 29 S. Ct. 214, it is said that "the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens." In Northwestern Bell Teleph. Co. v. Nebraska State R. Commission (1936) 297 U. S. 471, 80 L. ed. 810, 13 P.U.R. (N.S.) 467, 56 S. Ct. 536, it was held that state regulations in respect to depreciation rates for property used by a telephone company in interstate commerce were not suspended by a Federal statute giving the Interstate Commerce Commission authority to prescribe such rates "as soon as practicable." The court said (13 P.U.R. (N.S.) at p. 472): "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the

amendment . . . to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates." See, also, Smith v. Illinois Bell Teleph. Co. (1930) 282 U. S. 133, 75 L. ed. 255, P.U.R.1931A, 1, 51 S. Ct. 65.

Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truck drivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject. Whether that date was December 29, 1937, when those rulings were made, or whether it will not be until July 1, 1938, when they will go into effect, is a question not presented in the case at bar and one upon which we express no opinion. The violations of the state act charged against the company occurred before either of those dates and so at a time when the state act was in full force and effect. This same result has been reached as to other similar regulatory features of the Motor Carrier Act 1935. L & L Freight Lines v. Florida R. Commission (1936) 17 F. Supp. 13; Werner Transp. Co. v. Hughes (1937) 19 F. Supp. 425.

[9] The company further contends that the Commission is without statutory authority to promulgate rules and regulations for the enforcement of the act and that in consequence it cannot be punished for failure to conform to the provisions of rule 4N of Circular No. 2 of the Administrative Rulings referred to above.

The act does not in terms give the Public Service Commission authority to prescribe rules and regulations for the carriers to which it applies. A study of the act as a whole, however, makes it abundantly clear that the legislature intended to commit the enforcement of its provisions to the Commission. In addition, the section of the act which limits hours of service (§ 8), specifically provides that "The Commission shall have authority to enforce the provisions of this section," and § 12 provides a punishment by fine for "violating the orders of the Commission issued under the provisions of this act." These provisions taken together and considered in the light of the general scheme of the statute and the rule making power given to the Commission in other phases of its activities, lead to the conclusion that although the Commission is "an agency of limited powers and authority" (Re Boston & Maine Railroad, 82 N. H. 116, P.U.R.1925E, 698, 129 Atl. 880) it was the legislative intention that the Commission should enforce the provisions of this statute in the same way that it enforced its supervisory authority in other respects, i. e. by the promulgation of appropriate rules and regulations.

To construe the sentence quoted from § 8 otherwise than as above would be to hold that it gives to the Commission only such powers of enforcement as are given by the general law to police officers. To say the least it seems unlikely that such was the intention of the legislature.

[10] Rule 4N, after paraphrasing the provisions of § 8 of the statute, requires that each driver shall keep with

him while on duty a record of his hours of service on forms prescribed by the Commission, and that copies of such record shall be kept by his employer. It also provides that these records shall be filed with the Commission at the end of each month. These rules do not attempt to establish any broad "policy and standard for action" (Ferretti v. Jackson [1936] 88 N. H. 296, 304, 188 Atl. 474, 479; Re Opinion of the Justices [1937] 88 N. H. 497, 190 Atl. 713), and so do not amount to an unconstitutional usurpation of legislative power by the Commission. The rules are well calculated to aid the Commission in the enforcement of the act and are a valid exercise by the Commission of the powers given to it by the statute.

[11] The company's next contention is that the Public Service Commission exceeded its statutory authority in suspending the company's registration certificates for violation of the Commission's administrative rules. A sufficient answer to this contention is that it does not appear that the Commission's order of suspension was based upon such violations rather than upon a violation of the statute itself.

The statute (§ 11), gives the Commission authority to suspend certificates of registration for violation of the provisions of the act. Section 12 as amended by Laws 1933, Chap. 169, § 2, imposes a fine of not more than $100 for violation of "the provisions of this act or the orders of the Commission issued under the provisions of this act." We need not consider the question of the power of the Commission to punish under this latter section because it has imposed no fine. Instead it has suspended the company's certificates of registration. This is one of the punishments prescribed by the act for its violation and authority to suspend was clearly granted to the Commission. Suspension of registration certificates is not a punishment provided for violation of the rules of the Commission, and while there is evidence that the plaintiff had violated both the act and the administrative orders, there is nothing to show that the Commission based its order of suspension upon a violation of the latter rather than upon a violation of the former. To assume without evidence that it had disobeyed the statute by imposing the suspension for a violation of its orders rather than for a violation of the act would be to assume that the Commission had disregarded the clear wording of the statute. This is an assumption we are not compelled to make.

[12] It is established law in this jurisdiction that, in the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it. Spaulding v. Mayo (1923) 81 N. H. 85, 122 Atl. 899; Bean v. Quirin (1935) 87 N. H. 343, 350, 179 Atl. 421, 180 Atl. 251, and cases cited. We see no reason why this principle applicable to the findings of inferior courts is not also applicable to the Public Service Commission when acting judicially, and, applying it to the order of the Commission before us, we conclude that the suspension of registration which the Commission imposed upon the company was for the violation by it of the provisions of the statute and that its violations of

the administrative orders were either not found or were permitted to pass without punishment.

The evidence before the Commission of the company's violation of the statute by requiring or permitting its drivers to operate its trucks for illegally excessive hours was in the form of reports filed under the provisions of rule 4N by a few of the drivers. The company does not, nor may it, complain of the informality with which this evidence was presented. P. L. Chap. 238, § 10; State v. New Hampshire Gas & E. Co. 86 N. H. 16, 31, P.U.R.1932E, 369, 163 Atl. 724. Its complaint is that this evidence provides an insufficient basis for the order of suspension for the reason that it does not show that the company "required or permitted" its drivers to operate for excessive hours; that it does not show that driving in excess of the statutory limits occurred in New Hampshire rather than in other states in which the drivers served; and that it fails to reveal that such excess hours of operation did not occur under circumstances of emergency or upon a truck under the control of two licensed operators.

The evidence contained in the reports on file with the Commission show not only periods of employment for longer hours than the statute permits, but they also show repeated instances of such excessive hours and the oral testimony given before the Commission by the company's local manager showed that the drivers were paid on an hourly basis. Under these circumstances it would be little short of preposterous to say that the company had no knowledge of the hours of its drivers' employment. It would be equally preposterous to find that the drivers when operating over the statutory limits were acting outside the scope of their employment; that they were engaged upon a frolic of their own. The obvious inference from the testimony is that the company not only permitted but also even arranged its trips so as to require that its drivers serve beyond the statutory limit of hours of service.

[13] Proof that some of the company's drivers operated for hours in excess of the statutory limit in this state is contained in the inferences which may be drawn from their reports. These reports indicate that some of the drivers lived in Manchester and that their tours of duty after excessive hours of operation ended there. Obviously to have completed such a period of service within this state they must of necessity have operated illegally within its borders. The fact that some of the hours of service which went to make up the statutory limit occurred outside the state is not material. There is no violation of the statute until an operator has reached the limit of hours of operation allowed. The offense consists in operating thereafter, and such violation could findably have occurred within the state.

[14] The other respects noted above in which it is claimed that the evidence is deficient relate to matters peculiarly within the company's knowledge. If such facts existed it was the province of the company to offer evidence of their existence (State v. Foster [1851] 23 N. H. 348, 55 Am. Dec. 191; State v. Lapointe [1924] 81 N. H. 227, 123 Atl. 692, 31 A.L.R.

1212; State v. Bozek [1924] 81 N. H. 277, 124 Atl. 666), and full opportunity was given to it to do so.

Since the days specified for the suspension of the company's certificates have passed, the Commission may amend its order by specifying other days upon which its order of suspension shall be operative.

Appeal dismissed.

All concurred.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION

Re Niagara Falls Power Company

[Case No. 9186.]

Electricity, § 2 — Jurisdiction of Commission — Contracts — Furnishing of mechanical power — Water-power development.

1. Both the Public Service Law and the Conservation Law confer jurisdiction upon the Public Service Commission over the furnishing of services, facilities, and power which are provided for by contracts between a power company and an industrial company governning the leasing of lands and the sale of mechanical power, transmitted by turbines of the power company to generators of the industrial company, at a power site where the waters of a river (in which the state has a proprietary interest) are diverted by the power company, under statutory authority, for power purposes, p. 496.

Electricity, § 2 — Jurisdiction of Commission — Water power — Proprietary interest of state.

2. The existence in the state of a proprietary right or interest in waters diverted from a river for power purposes, as distinguished from the source of the waters, is not a prerequisite of jurisdiction of the Public Service Commission, under Conservation Law, § 621, to regulate and control the use and distribution of power generated by the use and diversion of any waters of the state in which the state has a proprietary interest, p. 496.

Electricity, § 2— Jurisdiction of Commission — Statutory provisions — Effect of prior legislation.

3. Conservation Law, § 621, conferring upon the Public Service Commission authority to regulate and control the use and distribution of power generated by the use and diversion of waters of the state in which the state has a proprietary interest, is applicable to any diversion and use of such waters for power purposes and the law does not contemplate that power developments protected by prior legislative acts are exempted, p. 496.

Contracts, § 1 — Powers of state — Vested rights or easements — Supply of mechanical power.

4. Contracts between a power company and an industrial company, governing the lease of lands and the sale of mechanical power transmitted by

turbines of the power company to generators of the industrial company at a hydroelectric power site, do not give the industrial company rights in the nature of easements, which rights and interests are vested and cannot be disturbed by regulatory authority, when each of the contracts was made either with a public utility subject to the jurisdiction of the Commission or with a business corporation engaged in the public service, p. 496.

Public utilities, § 64 — What constitutes public service — Furnishing of mechanical power.

5. The furnishing of mechanical power by a power company to an industrial company, by means of turbines of the power company connected to generators of the industrial company at a power site where the waters of a river are diverted by the power company for power purposes, constitutes the furnishing of public service subject to the jurisdiction of the Commission, p. 496.

Rates, § 238 — Schedules — Duty to file — Furnishing of mechanical power.

6. A power company furnishing to an industrial company, under contract, mechanical power transmitted from turbines of the power company to generators of the industrial company at a water-power site must file a service classification appropriate to cover the power furnished and the services and facilities rendered to it, and must file a schedule of rates applicable thereto, p. 496.

[September 30, 1938.]

PROCEEDING *on motion of Commission as to rates and charges of a power company for service provided an industrial company under contracts for the supply of mechanical energy from turbines of the power company; jurisdiction of Commission sustained and power company ordered to file service classification and schedule of rates.*

APPEARANCES: LeBoeuf, Winston, Machold & Lamb (by Randall J. LeBoeuf, Jr.), New York city, for the Niagara Falls Power Company; Warren Tubbs, Buffalo, Attorney for the Niagara Falls Power Company; Norman R. Gibson, Buffalo, Vice President and Chief Engineer, of the Niagara Falls Power Company; Hughes, Richards, Hubbard & Ewing (by A. L. Richards), New York city, attorneys for the Aluminum Company of America.

Gay H. Brown, Counsel for the Public Service Commission; and Lawrence J. Olmstead, principal Attorney for the Public Service Commission.

BURRITT, Commissioner: This investigation is an outgrowth of the general investigation of special contracts (Case No. 8768) and in particular of the special contracts of the Niagara Falls Power Company (Case No. 9002). The investigation in this latter proceeding resulted in the Niagara Falls Power Company placing all of its industrial consumers, with the exception of the Aluminum Company of America (hereinafter called

the Aluminum Company), on a new filed schedule. This company has been served under contracts executed at different dates, providing for a supply of mechanical energy.

Hearings were held in Buffalo on June 25, July 29, September 17, and November 15, 1937, and on February 14, 1938, at which 499 pages of testimony and 66 exhibits were received. The Aluminum Company filed a 113-page printed brief on the facts and the law which was received on April 19, 1938.

The Niagara Falls Power Company (hereinafter called the Power Company) presented Norman R. Gibson, its chief power engineer, as its principal witness, who was cross-examined at length by Aluminum Company's counsel. The Aluminum Company presented no witness of its own but from the witness Gibson developed in extensive detail the historical background of the beginning and growth of both the Power Company and the Aluminum Company, of their business activities at Niagara Falls and of the several contracts between them.

The exhibits are nearly all documentary or photographic in character and show the nature and development of the two companies and their relationship at Niagara Falls. Incidentally they afford an interesting detailed history of the early development and use of water power for the production of electrical energy.

The following table sets out for each contract its number as an exhibit in this case, the identification number assigned by the Public Service Commission, the date on which the contract was entered into, and the dates of its expiration:

Exhibit No. Case No. 9186	P. S. C. Identification Number	Power Company Identification Number	Date of Contract	Date of Expiration of Contract
7	19	1	8/ 2/1895	1921
8	20	2	2/ 2/1899	1921
9	21	3	12/27/1899	1921
10	22	4	11/20/1905	1967[1]
16	24	–	11/ 1/1922	1967

[1] Makes expiration date of former three contracts, 1967.

The contracts above listed were made by the following parties: Contracts 19, 20, 21, and 22 by the Niagara Falls Hydraulic Power & Manufacturing Company, a predecessor company to the Niagara Falls Power Company, and the Pittsburg Reduction Company, the former name of the Aluminum Company of America and Contract 24 by the Niagara Falls Power Company and the Aluminum Company of America.

The primary purpose of this present investigation is to determine whether or not the rates and charges and regulations of the Niagara Falls Power Company, as set forth in these contracts, for the service provided the Aluminum Company are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of any provision of law, as set forth in the order of this Commission dated June 9, 1937. The Power Company did not take a definite position and filed no brief on the questions at issue, but furnished all information required by the Commission.

The extent to which there may exist discrimination and preference is illus-

trated by Exhibit 66-a. This exhibit reveals the amount paid yearly from 1928 to October, 1936, inclusive, by the Aluminum Company to the Power Company for mechanical power under contract, as compared with the amount (certain assumptions were necessary) which would have been paid for the same amount of hydroelectric power, if billed under the filed schedules under which all other industrial companies at Niagara Falls obtain and pay for their hydroelectric power requirements. The exhibit covers both firm and variable energy and extends over a 10-year period. A summary of this exhibit follows:

Comparison between cost of mechanical power furnished under contracts and computed cost of equivalent electric power if supplied under filed schedules in effect at the time.

	Total Computed Charge		
	Pursuant to Schedule [1]	Pursuant to Contract [2]	Difference
1928	$982,884 [3]	$416,532	$566,352
1929	983,558	416,832	566,726
1930	974,437	413,573	560,864
1931	929,996	387,058	542,938
1932	923,608	250,806	672,802
1933	923,608	245,000	678,608
1934	923,608	245,000	678,608
1935	923,608	245,000	678,608
1936	942,596	357,724	584,872
1937 (Jan. to Oct.)	819,190	347,880	471,310

[1] Upon the basis of Power Company owning and operating all hydraulic and electric equipment.

[2] Upon the basis of the Aluminum Company owning and operating all electric equipment.

[3] Round figures; cents dropped.

In addition to the above amounts billed to the Aluminum Company, the Power Company annually passed on to the Aluminum Company about $10,000 for Federal license tax.

It is of interest to note that the power sold to theAluminum Company is measured by ammeters and voltmeters applied to the output of the generators, and by computation translated back into horsepower as taken off the shaft from the water wheel. An addition to the horsepower so determined is made to cover the efficiency of the generator so as to make the measurement in terms of the mechanical power delivered at the end of the water wheel shaft.

Motion of Aluminum Company to Dismiss

At the initial hearing on June 25, 1937, counsel for the Aluminum Company was present but entered no appearance and stated that he was there merely as an observer. Upon being asked if his client wished to be heard he declared that he had nothing to say at the time but that after the investigation the company might wish to appear.

On July 12, 1937, the Aluminum Company was served at its office in Pittsburg with a certified copy of the Commission's order in this proceeding, together with a covering letter from the secretary of the Commission formerly notifying it of the adjourned hearing set for July 29, 1937 (§ 23, Public Service Law). On that date the Aluminum Company, by counsel, appeared in the proceeding "especially and solely for the purpose of moving to dismiss the proceeding in so far as it relates to or is designed to affect the Aluminum Company of America or any of its property or property rights."

A long statement (40 pages) was entered in the record setting out the position of the Aluminum Company and the facts which it claims place it beyond the jurisdiction of the Commission. Counsel then made the fol-

lowing motion to dismiss the proceeding:

"I hereby move, appearing especially for the purpose, to dismiss this proceeding in so far as it relates to or is designed to affect the Aluminum Company or any of its property or property rights vested in that corporation under any of the instruments heretofore received in evidence herein, or any other property or property rights of the corporation by means or virtue of which the corporation now has, or at any time since August 5, 1895, has been engaged in the aluminum manufacturing business on or about the high bank of the Niagara river below Niagara Falls or is or has been using water power or mechanical power or generating electrical energy therefrom or transmitting such energy to its mill on the said high bank, on the ground that the Public Service Commission is without power or jurisdiction over such property or property rights, and on the ground that any statute purporting to confer upon the Commission any power or jurisdiction to impair any such property or property rights, or to take them for public uses, is unconstitutional under Art. 1, § 10, of the Federal Constitution, and the Fourteenth Amendment of the Federal Constitution, as well as under §§ 1 and 6 of the Constitution of the state of New York."

Ruling on the motion was reserved until the conclusion of the proceeding. It should be pointed out in connection with the appearance of counsel for the Aluminum Company that on September 17, 1937, when he sought to cross-examine a witness, I ruled that such cross-examination would constitute a general appearance, to which an exception was taken. Thereafter, counsel for the Aluminum Company cross-examined the Power Company's witness at length.

The Niagara Falls Power Company

This company is a public utility corporation organized by special act of the legislature, viz., Chap. 596 of the Laws of 1918. It is a consolidation of three companies, namely, Cliff Electrical Distributing Company, Niagara Falls Power Company (constituent), and Hydraulic Power Company of Niagara Falls (hereinafter referred to, respectively, as Cliff, Power Constituent, and Hydraulic). Hydraulic was incorporated on March 25, 1910, and on June 3, 1910, merged the Niagara Falls Hydraulic Power and Manufacturing Company. This latter company, as stated already, had executed the contracts of 1895, those of 1899, and the one of 1905.

The Niagara Falls Power Company is engaged in wholesaling power, both hydroelectric and, to a slight extent, steam, in the city of Niagara Falls. It has twenty-four customers, including Aluminum Company, and in addition serves six public utilities and the city of Niagara Falls. It does not sell electric current for domestic or small commercial uses, but such consumers in the city of Niagara Falls are supplied by affiliated companies. The peculiar and special nature of the arrangement for the sale of power between the Power Company and the Aluminum Company with respect to the source and method of utilization of the power supplied and its conversion into electric energy, makes it desirable to set forth in considerable detail the physical layout of the Power

Company's plant and the location of the Aluminum Company's plant in relation to it.

The Power Company's Plant

The Power Company owns a large amount of property, extending for a considerable distance along the east bank of the Niagara river both above and below the falls and includes a canal, a water tunnel, and a large power house. The power house, referred to as the Schoellkopf station, is divided into three parts, known respectively as 3–A, 3–B, and 3–C. Both the canal and the tunnel have their intakes at Port Day about a mile southeast of the Falls on the upper Niagara river and discharge their water into various basins and forebays located on the high bank of the river below the falls. The water then passes through penstocks, to the water turbines in the power house, located at the base of the cliff about 200 feet below and thence, after the energy has been removed, into the Maid-of-the-Mist pool.

The canal was begun in 1853 and its first utilization occurred in 1875. The tunnel was constructed by the present Power Company in 1923.

The so-called Schoellkopf station No. 3, as already related, consists of three parts, all of which are located within one building, with free access from one part to the other. They were constructed in different periods of the growth and development of the business, 3–A in 1904 to 1907, 3–B in 1918 about the time of the organization of the new Niagara Falls Power Company, and 3–C in subsequent years.

In this building there are 21 turbines, 15 in station 3–A, 3 in station 3–B, and 3 in station 3–C, all of which are owned by the Power Company. Station 3–A also contains 15 generating units, 10 of which are owned by the Power Company, and 5 units (actually separate generators) —being the most northerly—are owned by the Aluminum Company. The latter five units are driven by five turbines, Nos. 11 to 15, inclusive, each having two generators on its shaft, so that the Aluminum Company really has ten generators arranged in pairs, as compared with ten generators, one on each turbine shaft, owned by the Power Company. The generators are bolted into concrete foundations which are owned by the Power Company. The turbine room and the generator room in Station 3–A are separated by a concrete wall extending to the ceiling. The turbine shafts used to drive both companies' generators, extend through this concrete wall which merely separates the generating section of the station from the turbine section. The generators of both companies are in the same room undistinguished as to ownership.

The Aluminum Company's Plant

The Aluminum Company owns a large manufacturing plant built on the high bank about 200 feet above and 400 to 500 feet from the Power Company's plant at the river's edge. This plant is built on land leased from the Power Company, the extent of the land being described within the several contracts. As related by the Power Company's chief engineer, the Power Company owns the entire building housing the power plant, including the wall between the turbine

and generator rooms and the foundations for all the generators, those of the Aluminum Company as well.

The Aluminum Company maintains appliances and facilities for handling and controlling the electricity generated and conducts it to its manufacturing plant on the high bank by means of copper and aluminum bus bars (Exhibits 51–A to F). On their way to the Aluminum plant on the high bank these bus bars pass through a narrow well or shaft constructed by the Power Company, which is walled into the side of the cliff. The facilities and appliances used to control and handle the current consist mainly of a small switchboard gallery or control room containing meters and switches for the operation of the generators.

The shafts of the Aluminum Company's generators are attached to the turbines of the Power Company by means of couplings, consisting of two flanges tied together by bolts. These flanges are located on the westerly or river side of the separating wall. The flanges were provided by the Aluminum Company and the bolts were supplied by the Power Company. The actual labor was performed by the Aluminum Company.

The Aluminum Company employees operate the generators and keep them in repair. They also have the right, together with the Power Company, to control the turbine gates which regulate the flow of water when that is necessary.

Electric power consumed by the Aluminum Company in its production is entirely direct current, whereas all of the current (except a minor amount for the exciters) generated by the Power Company is alternating current. The reason for this use of direct current is said to be that the manufacture of aluminum by the Hall method, in use by the Aluminum Company, is an electrolytic as well as a heat action process, requiring the application of direct current. Alternating current is not able to provide the necessary reaction in the pots to liberate the aluminum from the aluminum ore or bauxite. Technically, there is nothing preventing the Aluminum Company from taking alternating current and converting it into direct current, but the factor of cost makes it prohibitive. The amount of loss by conversion was estimated to be between 6 and 8 per cent.

Historical Background

Before describing the contracts, which are the subject of this investigation, it is pertinent to note what preceded them. In 1879, more than twenty years after the canal was begun, a predecessor, the Manufacturing Company, acquired not only the hydraulic canal but a considerable area of land lying along the east bank of the river, together with the right to discharge water over the bank below the falls. This made the location suitable for mill sites and manufacturing and many leases were made by the Power Company's predecessors which are referred to in detail in the record.

In 1881 the Manufacturing Company began to lease mechanical power in conjunction with mill sites. One of the earliest of these leases was made to John F. Quigley, which passed by succession to the Cliff Paper Company. This lease provided that the Manufacturing Company was to construct and maintain water-power ma-

chinery and supply the Paper Company with power by means of a shaft running to the leased premises. Before the year 1892, the Cliff Paper Company erected a building on the high bank. The Manufacturing Company's machinery was actually installed in the basement of this building and throughout the testimony is referred to as Station No. 1.

Similarly, Oneida Community, Limited, lessee of land, was entitled to receive power by means of shafts, poles, and a belt from Station No. 1. There were other such leases.

In 1892 the Cliff Paper Company made a new lease with the Manufacturing Company calling for additional land between the high bank and the river's edge and pursuant to this second lease a small building was erected at the base of the cliff and therein was installed suitable machinery for the use of water power. Down to this building went water discharged from Station No. 1 and thereafter the Cliff Paper Company received two kinds of power—mechanical power in Station No. 1, and raw water power turning the turbines of the Paper Company in the building at the base of the cliff. The Cliff Company also generated electricity in this lower building and Manufacturing Company did likewise in Station No. 1. With the advent of Station No. 2 in 1896, Station No. 1 was abandoned and by 1902 was no longer in use.

Between 1895 and 1905, the date of the fourth of the Reduction Company leases, the electrical consumers of Manufacturing had increased steadily. These customers included tenants, others served by means of a pole line, while still others received electricity over their own transmission lines. Over this period this electrical power was generated both in Station No. 1 and No. 2.

On November 4, 1909, the Manufacturing Company sold its electric power plant and electrical distributing system to the Cliff Electrical Distributing Company. In this agreement there are listed the contracts, then existing, under which the Manufacturing Company was committed to supply electrical power. This agreement for the transfer of the electrical business was supplemented by a further agreement made on January 24, 1910. The Public Service Commission, Second District, in existence at that time, approved the transfer.

The provisions of the supplemental agreement covering the cost to the Cliff Company of the mechanical horsepower supplied by Manufacturing Company and which the Cliff Company converted into electricity, mentions specifically that upon any complaint to the Public Service Commission or other Commission authorized by law to fix the price of electricity sold by the Cliff Company, the Commission is to have full right to investigate the just and reasonable price of mechanical horsepower. To this end permission is given to examine the cost of the same to the Niagara Falls Hydraulic Power and Manufacturing Company with the right of examination of books and records, to the same extent and with the same authority as the Public Service Commission might lawfully do under other specified provisions of the Public Service Commissions Law. It also provides that the Commission, in fixing the price to be charged by Cliff Company for elec-

tricity, will not be bound by the price charged by Manufacturing Company for mechanical horsepower. Further, the Manufacturing Company agreed that in every case where the price to be charged by the Cliff Company is fixed by the Commission, the Commission at the same time, on its own motion or at the request of the Cliff Company, may fix the price to be paid by Cliff to the Manufacturing Company for mechanical horsepower used in the generation of the electricity which Cliff Company sold. These provisions were made binding upon the successors or assigns of each and both of the parties thereto.

Contracts

The first agreement entered into between Manufacturing Company, a business corporation, and the Pittsburg Reduction Company, was dated August 2, 1895. It was a lease for a period of twenty-five years providing for the rental of land and mechanical power. On February 2, 1899, and December 27, 1899, this agreement was supplemented by two others requiring additional land and power.

The agreement of 1895 provided for the leasing of 20,000 square feet of land and also mechanical power necessary for the development of 3,000 electric horsepower. The Pittsburg Reduction Company rented the premises for the purpose of erecting a plant for the manufacture of aluminum involving the use of electricity. The Manufacturing Company was to erect on the lower bank of the river a complete water-power plant with which to furnish to the Pittsburg Reduction Company, mechanical power necessary for the development of electric power. It was understood that the plant to be constructed by the Manufacturing Company could be of greater capacity than the needs that the Pittsburg Reduction Company demanded, the excess to be at the disposal of the Manufacturing Company since the plant was not to be for the sole accommodation of the Reduction Company. Suitable space was to be provided in the power plant for the erection of dynamos by which the Reduction Company was to obtain its supply of electricity. The Manufacturing Company was to erect the dynamo foundations to be paid for by the Reduction Company while the cost of the dynamos themselves and the connections to the turbine shafts of the Manufacturing Company were to be at the expense of the Reduction Company. The electricity produced was to be conducted by the Reduction Company to the building to be erected on the high bank of the river.

Following this agreement, on February 2, 1899, the Reduction Company was desirous of leasing additional land and power to develop a greater quantity of electricity. Consequently, the two parties entered into a further agreement expiring at the same time as the lease of 1895.

Under this agreement the Reduction Company was permitted a sufficient amount of mechanical horsepower for the development of 3,620 electrical horsepower. The Manufacturing Company agreed to erect further turbine water wheels to be devoted exclusively to the development of power for the Reduction Company and, on its part, the Reduction Company agreed to erect additional dynamos. The provisions respecting the

cost to each company were similar. Under this lease there was a reduction in the cost to the Reduction Company for mechanical horsepower. The lease of December 27, 1899, required the Manufacturing Company to supply 4,000 mechanical horsepower and 2,000 additional on option. In other respects the two contracts in 1899 are substantially the same.

In the next year, 1900, the Reduction Company took advantage of the option contained in the December 27, 1899, lease. In the aggregate, these leases provided for the supply of 13,000 mechanical horsepower.

The terms of these leases were carried out by both parties. The Reduction Company erected its plant and the Manufacturing Company built its station referred to as Station No. 2, which was continued in use until about 1925.

Operations as outlined above continued under these contracts until 1905 when the Reduction Company was in need of a new mill. The Manufacturing Company was engaged at this time in erecting a new power house to be known as Station No. 3, close to the site of existing station No. 2. Accordingly, on November 20, 1905, a new agreement was entered into between the parties.

This new lease provided for the leasing of land and the completion of station No. 3 with the necessary machinery to supply Reduction Company with power under the lease. The Manufacturing Company was to have the power house substantially completed by May 1, 1907, in order to supply an agreed amount of power, with the amount to increase during the years 1908–1909.

The Reduction Company was to erect a new manufacturing plant and also dynamos of sufficient capacity to convert into electricity the mechanical power which the Manufacturing Company was to supply. The Reduction Company was permitted to take 27,000 mechanical horsepower and 9,000 additional on notice prior to May 1, 1909, making a total of 36,000 at $8 per mechanical horsepower.

Dynamos were to be erected by the Reduction Company at its expense and were to be of a capacity sufficient so that all of them together would be able to convert into electricity the 36,000 mechanical horsepower to be received. The lease contained a provision whereby the Manufacturing Company was to erect penstocks and turbine water wheels and provide the facilities for delivery of the power provided for in the lease. The Manufacturing Company agreed also to erect the foundations upon which the Reduction Company's dynamos were to be mounted. The maintenance and care of the connections attaching the water wheel shafts to the generators was to be assumed and paid for by the Manufacturing Company. The Reduction Company agreed at its own expense to provide the facilities to conduct the electrical current from the power station to the Manufacturing plant on the upper bank. Turbine supplies and their repair and maintenance were to be the obligation of the Manufacturing Company.

Pursuant to these terms, a large factory covering about four acres was constructed by the Reduction Company, and the Power Company completed its power plant, known as station No. 3.

In 1910 the Aluminum Company (Reduction Company now called Aluminum Company of America) required more power and under a lease dated October 5, 1910, the Hydraulic Power Company of Niagara Falls agreed to deliver 6,000 additional mechanical horsepower at old station No. 2. This amount added to the 13,000 already being delivered at station No. 2 under the contracts made by Manufacturing Company and the 36,000 received under the lease of 1905 made a total to be supplied to the Aluminum Company of 55,000 mechanical horsepower. It should be pointed out again that station No. 2 was continued in operation until about 1925, and it was not until 1923 that Aluminum Company's units had all been removed.

The following year, 1911, a contract was made by the Aluminum Company with the Cliff Electrical Distributing Company, a constituent of the present Power Company, for a supply of alternating current. This contract by its terms was to expire on November 26, 1921. It was later superseded by a contract dated November 1, 1922, which also provided for a supply of alternating current and is to expire on October 31, 1942. Another agreement, dated November 26, 1912, is important because the Aluminum Company relinquished the additional 6,000 mechanical horsepower which was provided by the contract of October 5, 1910, described above, reducing to 49,000 the total amount of mechanical horsepower agreed to be supplied to the Aluminum Company. It expired on November 26, 1921, and because of its expiration is not pertinent at this time.

The consolidation of the Hydraulic Power Company of Niagara Falls the Cliff Electrical Distributing Company, and the Niagara Falls Power Company took place in 1918, when the Niagara Falls Power Company, as now constituted, took title to the properties of the constituent companies, including the two power stations, Nos. 2 and 3, and the Aluminum Company's mill site.

The consolidation agreement declares that the respective parties, together with their stockholders, stipulate as a condition of the consolidation that the new corporation will be under the jurisdiction of the Public Service Commission for all purposes including service and rates.

Subsequent to the consolidation comes the new contract of November 1, 1922, which is the last contract of interest in this inquiry.

In this contract the Niagara Falls Power Company is stated to be the successor in interest to the Cliff Electrical Distributing Company and Hydraulic Power Company of Niagara Falls, the last-named company being the successor through merger of the Niagara Falls Hydraulic Power & Manufacturing Company.

After a brief description of the agreements of 1895, the two of 1899, and the one of 1905, this contract declares that for the purposes of efficiency, economy, and safety the Power Company desires that the 13,000 mechanical horsepower furnished by it to the Aluminum Company in Station No. 2 should be supplied from Station No. 3. The Aluminum Company, therefore, agreed to replace five 3,000-kilowatt generators in Station No. 3 with five new generators of

5,000-kilowatt capacity each. The result of this gave the Aluminum Company a total of 49,000 mechanical horsepower in Station No. 3.

During the installation period of the new generators, the Power Company agreed to supply alternating current to the Aluminum Company. Furthermore, the Power Company, on failing at any time to supply the necessary amount of mechanical horsepower, is obligated to supply a designated amount of alternating current. This supply of alternating current is in lieu of any obligation on the part of the Power Company to maintain a spare turbine water wheel in Station No. 3 for the use of the Aluminum Company.

Under this contract, the power requirements of the Aluminum Company of America continue to be supplied. The Niagara Falls Power Company in accounting for this portion of its utility business makes no segregation of this service rendered from the service rendered others. Nor is there any segregation of the expenses of this business nor of the revenues derived therefrom.

Before completing this statement, it is important to point out that the water from which the Aluminum Company derives its electricity was referred to in an act (Chap. 597, Laws of 1918) passed at the time of the consolidation of the Cliff Electrical Distributing Company, Niagara Falls Power Company, and Hydraulic Power Company of Niagara Falls. This act authorized the new corporation (Niagara Falls Power Company) to divert any amount of water not in excess of the amount already permitted to be diverted by any of the corporations so consolidated. It was provided, however, that if the new corporation diverted for power purposes more than 15,100 cubic feet per second, the state reserved the right to charge an equitable rental therefor. It is observed that this diversion limit in the New York statute is less than the 20,000 cubic feet per second which the Power Company presently diverts to meet the requirements of all its power consumers, including the Aluminum Company.

Jurisdiction

[1–6] The above facts, as shown in a series of sixty-six exhibits already referred to, and by the testimony of witness Gibson, chief engineer of the Power Company, are not disputed but are generally concurred in by all parties. However, the Aluminum Company vigorously disputes the jurisdiction of the Commission to interfere with, or in any way modify, what it claims are its private property rights. The legal questions thus raised have been carefully examined and the following discussion of the applicable law and our conclusions thereon are submitted.

Both the Public Service Law and the Conservation Law confer jurisdiction upon the Public Service Commission over the furnishing of services, facilities, and power which are provided for by the several contracts involved in this proceeding.

By Article 14 of the Conservation Law, § 621 thereof, the legislature has provided:

". . . Jurisdiction is hereby conferred upon, and it shall be the duty of, the Public Service Commission *to regulate and control the use and dis-*

tribution of all power generated . . . by any person, association of persons or corporation, *by the use and diversion for power purposes of any waters* of the state in which the state has a proprietary right or interest, and to fix reasonable rates to be charged by . . . such person, association of persons, or corporation, for *furnishing heat, light, or power generated wholly or partly by the use of water in which the state has a proprietary right or interest.*"

It cannot be disputed that Power Company uses and diverts for power purposes the waters of the Niagara River. It is likewise undisputed that the waters so diverted by Niagara Falls Power Company are utilized to generate two separate and distinct types of power. By the use of water wheels and generators, power in the form of electrical energy is produced and distributed to consumers. By the use of turbines, power in the form of mechanical energy is generated and furnished to Aluminum Company of America. "All power" generated by the use of diverted waters, in which the state has a proprietary interest, is by § 621 of the Conservation Law made subject to the regulation, control, and rate-fixing powers of the Public Service Commission.

That the state has a proprietary right or interest in the waters used and diverted by the Niagara Falls Power Company is now established by judicial decision. Niagara Falls Power Co. v. Water Power & Control Commission (1935) 267 N. Y. 265, 196 N. E. 51.

The fact that the state has a proprietary right and interest in the Niagara river, whose waters are concededly diverted and used by Niagara Falls Power Company to generate power, brings the use and distribution of the power generated therefrom under the regulation and control of the Public Service Commission.

In carrying out the powers conferred by the legislature in § 621, it is provided therein:

". . . To carry out the provisions of this section, and until otherwise provided by law, complaints, inspections, investigations, hearings, rules, regulations, orders, and determinations may be made or had, and rules, regulations, and orders enforced, in the manner, so far as applicable, provided in the Public Service Commission law in respect of electrical corporations and of the manufacture, sale, and distribution of electricity."

The contentions of Aluminum Company of America questioning the jurisdiction of the Commission under the provisions of the Conservation Law were set forth in the record herein at great length and were amplified in the lengthy brief filed by the company in this proceeding.

In brief, the contentions of the Aluminum Company in questioning the jurisdiction of the Commission under the provisions of the Conservation Law are as follows:

1. That the state of New York has no proprietary right or interest in the water used in the operation of the Aluminum Company's generators.

2. That the Conservation Law has no application to power developments now in operation under the protection of prior legislative enactments.

3. That the several contracts entered into between Aluminum Company of America and Niagara Falls

Power Company and the predecessors of each of them gave rights to the Aluminum Company in the nature of easements which said rights and interests are vested and cannot be disturbed by regulatory authority.

With respect to the contention first above set forth, such a construction of the provisions of § 621 of the Conservation Law would wholly defeat and nullify the provisions of that section. The statute is designed to confer regulation and control over the use and distribution of power generated by the use and diversion for power purposes of any waters of the state in which the state has a proprietary interest. To argue that a prerequisite of jurisdiction is the existence of a proprietary right or interest in the *waters diverted* for power purposes as distinguished from the source of the waters is neither within the express language nor the spirit of the statute.

With respect to the second contention of the Aluminum Company above set forth, it is pointed out that § 4 of Chap. 579 of the Laws of 1921 was amended by Chap. 242 of the Laws of 1922, p. 594, to read as follows:

"4. *Saving clause.* — Nothing in this act shall be construed to affect any right of eminent domain under existing laws, or to subject to the power of eminent domain any property owned, used, or possessed by any municipal corporation without the consent of the legislative body of such municipal corporation, or to impair any existing right of diversion and use of waters lawfully acquired by grant or otherwise or to repeal or affect Chap. 2 of the Laws of 1920, excepting as provided in §§ 621 and 637 hereof; . . ."

The above language employed by the legislature thus evidences an intent to make § 621 and § 637 of the Conservation Law applicable to *any* diversion and use of water for power purposes in which the state has a proprietary right or interest. The law does not contemplate, and the Aluminum Company contends, that power developments protected by prior legislative acts are exempted from the provisions of § 621 of the Conservation Law.

With respect to the third contention of the company that its rights to power are vested rights in the nature of easements which cannot be disturbed by regulatory authority, the Aluminum Company in its brief herein has cited numerous judicial decisions of the courts of this state as well as other jurisdictions in support of its contention.

From an examination of these authorities and a study of each of the contracts involved in this proceeding the conclusion is reached that the rights and interests of the Aluminum Company are not in the nature of easements in real property of such a nature as to be beyond the regulatory powers of the state or one of its administrative bodies, but that the rights and interests of the company find their source in a series of bilateral contracts. Each of the contracts is made either with a public utility subject to the jurisdiction of this Commission or, in the case of the contracts made with the predecessor companies of Niagara Falls Power Company, were made with a business corporation, which as fully appears from the record, was engaged in the public service. Contracts of this nature

made with utility companies or with corporations in fact engaging in the public service are subject to the regulation and control of the state and its administrative agencies.

It also appears from the language of the contracts themselves that the parties thereto contemplated that the same might become affected with the public interest and subject to the jurisdiction of the state. The conduct of Niagara Falls Power Company with respect to the services performed, the manner in which the books and records of the company are kept with respect to the fixed capital of the company employed in connection with the services rendered under the contracts, and the method of entering revenues received for the performance of said contracts upon its book and records, evidences a clear intent upon the part of Niagara Falls Power Company that the services rendered Aluminum Company are public services and are not a business deemed by it to be separate and apart from its business as a public service corporation.

A discussion of the jurisdiction of the Commission pursuant to the Public Service Law over services of the nature of those rendered by the Power Company to Aluminum as disclosed by the record would be superfluous in view of the conclusions reached as to the jurisdiction of this Commission pursuant to the provisions of the Conservation Law.

Conclusion

The services rendered disclosed by the record herein by Niagara Falls Power Company to Aluminum Company of America pursuant to the contracts involved in this proceeding are in the nature of public services and subject to the jurisdiction of this Commission.

I therefore recommend that Niagara Falls Power Company be required to file a service classification appropriate to cover the power furnished to Aluminum Company of America and the services and facilities rendered to it, and to file a schedule of rates applicable thereto.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Public Utility Commission

v.

West Penn Power Company

[Complaint Docket No. 11439.]

***Records, § 1** — Public — Examination of Commission records.*

An examination of the correspondence folders of the Commission by a public utility company under investigation in a rate case was held not to

be necessary under the rules of law or the principles of fair play, where it was shown that the company was aware of the issues involved from the inception of the case, that there had been no finding or conclusion by the Commission, that the company would be given full opportunity to file exceptions when a tentative order or decree nisi should have been entered, and that all formal records in the Commission files involving matters related to the instant case had been offered by counsel for the Commission.

Records, § 1 — What constitutes public records — Papers, letters, and documents of Commission.

Discussion of the question whether papers, letters, and documents within the possession of the Commission are public records, p. 500.

Evidence, § 27 — Admissibility — Recommendation by Commission staff.

Statement that any recommendation made by the technical staff to the Commission which results in an order for a rate investigation would be clearly inadmissible as a conclusion or an opinion, but that the facts and data upon which the recommendation is based, if considered or given any weight whatever in the order or finding of the Commission, should be placed in the record and the respondent given full opportunity to cross-examine, p. 503.

[September 28, 1938.]

APPLICATION *by public utility company in rate case for leave to examine correspondence files in certain proceedings before Commission and certain other information alleged to be in the possession of the Commission or its technical staff relating to the institution of a rate investigation; denied.*

By the COMMISSION: On July 7, 1937, the Commission made an order on its own motion, instituting an inquiry and investigation for the purpose of determining the fairness, reasonableness, and justness of the rates and charges of the West Penn Power Company.

At a hearing held June 17, 1938, counsel for the Commission introduced into evidence by reference records of certain prior preceedings to which the respondent was a party, whereupon counsel for respondent asked that the respondent be permitted access to the correspondence folders at the same docket numbers. Later, on July 25, 1938, respondent made written application for leave to examine: (1) the correspondence folders in certain enumerated proceedings, of which the formal records had been introduced into evidence by counsel for the Commission; (2) all correspondence and all reports, data, and information (including reports, data, and information furnished or compiled by the technical staff), with special reference to the information referred to in the order of the Commission dated July 7, 1937, relating to the present proceeding in the possession of the Commission or its technical staff, for the purpose of determining whether or not any information, documents, or data contained therein, should be offered in evidence as a part of its case. After argument and briefs

filed, the question now before the Commission is whether or not the respondent has the legal right to examine the correspondence files of the Commission, which, the respondent alleges, contain letters, reports, and data upon which the Commission predicated its order of July 27, 1937, instituting an inquiry and investigation, all of which have heretofore not been regarded as matters of public record. The respondent has acted on the premise that all papers, letters, and documents within the possession of the Commission are public records. No statutory authority is offered in support of this contention.

In Com. ex rel. Walton v. Bair (1896) 5 Pa. Dist. 488, 489, we find: "A public record is a memorandum made by a public officer authorized to perform that function, or a writing filed in a public office intended to serve as evidence of something written, said or done."

It has not been demonstrated that the papers, documents, and data sought to be inspected by the respondent fall within this description of public records. No Pennsylvania authority has been cited in support of respondent's contention. It has been recognized by the courts of New York, California, Kentucky, and Wisconsin that there are certain matters that come into the custody of public officers that are not matters of public record and therefore not accessible to the public.

In People ex rel. Updyke v. Gillon (1889) 18 N. Y. Civ. Pro. 109, 9 N. Y. Supp. 243, it was held that advice furnished by corporation counsel to assessors under a statute making it the duty of the corporation counsel "to furnish every department and officer of the city government such advice and legal assistance, as counselor or attorney in or out of court as may be required," is privileged.

In Colnon v. Orr (1886) 71 Cal. 43, 44, 11 Pac. 814, we find: "It is not every written charge made to a board of supervisors, a board of directors or trustees of a college, or other state institution, which upon being filed in the office of their secretary or treasurer, or custodian of their records, becomes thereby a public record, to which any citizen may have access at pleasure."

In Coldwell v. Board of Public Works (1921) 187 Cal. 510, 519, 202 Pac. 879: "We are of the opinion that the preliminary estimates and details which form these incompleted data are not of such a character as would constitute them public records. Until they receive some official approval the documents cannot be considered the act or the record of an act of the city engineer or of the board of public works."

In Barrickman v. Lyman (1913) 155 Ky. 710, 160 S. W. 267, the court said, in denying access to certain reports of the city engineer's office, of the city of Louisville, to a plaintiff in a personal injury case: ". . . if the officers have in their possession any papers or memoranda which are not required by law to be kept by them as official records, such papers and memoranda are not public records, and are not subject to inspection by the public."

In the case of State ex rel. Spencer v. Freedy (1929) 198 Wis. 388, 391, 223 N. W. 861, where the plaintiff sought a mandamus to compel the

state fire marshal to disclose the reports of investigators concerning a fire which had destroyed her property, the reports to be used in preparation of her case against the insurance company, the court, in refusing the writ, said: "The various reports, correspondence, and examinations made with reference to any particular fire carry no public interest, but statistics covering all fires, showing their causes, the facts and circumstances under which they originate, have an educational value, and this is what the legislature intended to make available to the public."

The Commission recognizes the rule that information in the possession of the Commission, but not put in evidence, cannot support an order. Ohio Bell Teleph. Co. v. Ohio Pub. Utilities Commission (1937) 301 U. S. 292, 81 L. ed. 1093, 18 P.U.R.(N.S.) 305, 57 S. Ct. 724; Pennsylvania R. Co. v. Public Service Commission (1918) 69 Pa. Super. Ct. 404; Philadelphia Rapid Transit Co. v. Public Service Commission (1922) 78 Pa. Super. Ct. 593; Latrobe Water Co. v. Public Service Commission (1936) 123 Pa. Super. Ct. 21, 17 P.U.R. (N.S.) 209, 186 Atl. 294. There is no question before the Commission at this time warranting the application of this rule as laid down by the Supreme Court of the United States and followed by the courts of Pennsylvania.

While it is argued by respondent that an exploration of the files of the Commission, not constituting public records, is necessary as a rudiment of fair play, we feel that an examination of the record and the testimony in the instant case will conclusively demonstrate that the respondent has been in no way restrained or hampered at the hearings in the presentation of its proofs. As we read the case of Morgan v. United States (1938) 304 U. S. 1, 82 L. ed. 1129, 23 P.U.R.(N.S.) 339, 58 S. Ct. 773, we do not see that it is controlling in this case. The practice before the Commission conforms to the standards expressed by the Supreme Court. In the practice before this Commission, "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." The respondent will be given ample opportunity consistent with the regulations of the Commission to except to the Commission's findings at the proper time and to argue the exceptions. See Rule 13, subsection (g) of the Commission's Rules of Practice and Procedure: "(g) In all inquiries and investigations instituted by the Commission against the reasonableness of the rates of a public utility, and in all other proceedings instituted by the Commission, which in its opinion require the issuance of an 'order nisi,' the following procedure will govern:

"1. (a) Briefs may be filed with the Commission within fifteen days after filing of the testimony transcript of the last hearing in the proceedings; except that when the Commission serves notice on the respondent that it proposes to issue an interim order fixing temporary rates on the evidence then of record, briefs may be filed within fifteen days after filing of the testimony transcript of the hearing at

which the Commission serves such notice.

. . . . . .

"2. After expiration of the time set for filing briefs, an 'order nisi' shall issue containing the statement of the issues and facts and findings and conclusions of the Commission. This 'order nisi' shall be served by mailing copies to the parties or attorneys who appeared at the hearing or upon briefs.

"3. (a) Within fifteen days after service of the 'order nisi,' any party may file with the Commission, in the manner prescribed for briefs, exceptions to the 'order nisi' and brief in support of the exceptions. Exceptions and brief shall be contained in one print or document."

In the Morgan Case, *supra*, at p. 342 of 23 P.U.R.(N.S.): "No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the secretary, but their application was denied on July 6, 1933, and these suits followed." In view of Rule 13 of the Commission's rules of practice and procedure the respondent will not be harassed by the same practice that was followed in the Morgan Case.

We are compelled to infer from the examination of the testimony thus far offered in the instant case by the respondent and the record statements of counsel for respondent that it has been aware of the issues involved from the inception of the case. The order of July 7, 1937, we feel to be sufficiently definite to have placed on the respondent the burden of proving that its rates are fair, reasonable, and just. This view is that of the Supreme Court of the United States, as stated in the case of Federal Trade Commission v. Gratz (1920) 253 U. S. 421, 430, 64 L. ed. 993, 40 S. Ct. 572: "All that is requisite in a complaint before the Commission is that there be a plain statement of the thing claimed to be wrong, so that the respondent may be put on his defense."

In the case of United States ex rel. St. Louis S. W. R. Co. v. Interstate Commerce Commission (1924) 264 U. S. 64, 79, 68 L. ed. 565, 44 S. Ct. 294, the Commission had made a tentative valuation of the company's property. The latter sought the right to examine the information and data upon which the valuation was based. This was refused. Whereupon mandamus proceedings were instituted to compel the Commission to permit access to its records. The court denied the writ and, on appeal, the Supreme Court, while upholding the court below, said:

"But, subject to that discretion, we think that, in such way as may be found practicable, the relator should be enabled to examine and meet the preliminary data upon which the conclusions are founded, and to that end should be given further information in advance of the hearing, sufficient to enable it to point out errors, if any there be."

In that case the Interstate Commerce Commission had made an order. It had reached a conclusion, that is, had made a tentative valuation and under all of the precedents, both Federal and state, the company had a legal

right to be apprised of the data upon which the conclusion was founded. There has been no finding or conclusion in the instant case that the rates and charges of the respondent are unjust, unreasonable, or unfair. When a tentative order or decree nisi will have been entered, the respondent will be given full opportunity to file exceptions and to point out to the Commission wherein the order is deficient or has been founded upon data or information dehors the record. Any recommendation made by the technical staff to the Commission which resulted in the order of July 27, 1938, would be clearly inadmissible as a conclusion or an opinion. However, the facts and data upon which the recommendation was based, if considered or given any weight whatever in the order or finding of the Commission, should be placed in the record and respondent given full opportunity to cross-examine. Counsel for the Commission has stated of record that it has been his purpose to offer all formal records in the Commission files which involve matters relevant to this proceeding. Respondent cites no specific matter of such character in our possession not already offered in evidence, and we know of no such records.

Respondent is now proceeding to present its case in chief which, it asserts, has been prepared for some time. All of the formal records in the Commission files involving matters related to the instant case have been offered by counsel for the Commission. Any rates prescribed by the Commission must be based upon matters of record. Any order fixing rates under amended Rule 13 of our Rules of Practice, will be subject to exception by respondent.

In the present state of the record, we are not persuaded that an examination of the correspondence folders of the Commission by the respondent is necessary under the rules of law or the principles of fair play; therefore,

Now, to wit, September 28, 1938, it is *ordered*: That the application of the respondent for leave to examine the correspondence files in certain proceedings before the Commission as enumerated in respondent's petition filed July 25, 1938, and certain other information alleged to be in the possession of the Commission or its technical staff, with special reference to the order of the Commission dated July 7, 1937, be and the same is hereby refused, with leave to respondent to present a new application setting forth with particularity a description of the data sought if any rates prescribed by the Commission shall appear to be based upon data not of record.

★ ★

ACCEPTANCE!

ngineering executives purchase equipment on demonstrated performance. That ulcan Soot Blowers are on the preferred list of engineers who buy because demonstrated lowest maintenance sound engineering and the ruggedest con-ruction ever built into Soot Blowers, is evidenced by the following partial list representative contracts installed or sold in 1937.

Allis Chalmers Co. .....West Allis, Wis.	MacSim Bar Paper Co. .....Otsego, Mich.
Ames, City of .....Ames, Iowa	Mendocino State Hospital ....Mendocino, Calif.
Atlantic Refining Co. .....Atreco, Texas	Metropolitan Edison Co. .....Reading, Pa.
Baltimore Transit Co. .....Baltimore, Md.	Municipal Power Plant .....Rochester, Minn.
Bethlehem Steel Co. .....Sparrows Point, Md.	N. Y. State Electric & Gas Co....Dresden, N. Y.
Chain Belt Company .....Milwaukee, Wis.	Ohio Power Co. .....Windsor, W. Va.
Columbia Enameling & Stamping Co., Terre Haute, Ind.	Pennsylvania Electric Co. .....Sewart, Pa.
Container Corporation .....Carthage, Ind.	Ralston Purina Company.....Battle Creek, Mich.
Continental Diamond Fibre Co. ....Newark, N. J.	Republic Oil & Refining Co. ....Texas City, Texas
Crosley Radio Corporation .....Cincinnati, Ohio	Republic Steel Co. .....Thomas, Ala.
Eldora Gold Mines .....Port Hope, Ontario	Rochester & Pittsburgh Coal Co.....Lucerne, Pa.
Elgin, Joliet & Eastern R. R. Co.....Gary, Ind.	Schervier Hospital .....New York City
Formica Insulating Co. .....Cincinnati, Ohio	Sherwood Refining Co. .....Warren, Pa.
Globe Steel Tubes Co. .....Milwaukee, Wis.	Sloan Blabon Co. .....Philadelphia, Pa.
Hamilton Coke & Iron Co. .....Hamilton, Ohio	A. E. Staley Mfg. Co. .....Decatur, Ill.
Helwig Silk Dyeing Co. .....Philadelphia, Pa.	Thilmany Pulp & Paper Co. .....Kaukauna, Wis.
Hudepohl Brewing Co. .....Cincinnati, Ohio	Tide Water Power Co. .....Wilmington, N. C.
Jose Arechabala Socieda .....Cardenas, Cuba	Timken Roller Bearing Co. .....Columbus, Ohio
Kaukau Sugar Co. .....Honolulu, Hawaii	United Refining Co. .....Warren, Pa.
Kendall Refining Co. .....Bradford, Pa.	U. S. Military Academy .....West Point, N. Y.
Keystone Public Service Co. .....Oil City, Pa.	Vacuum Oil Co. .....Paulsboro, N. J.
Latonia Refining Co. .....Latonia, Ky.	Village of Hinsdale .....Hinsdale, Ill.
Lehigh Portland Cement Co. .....Oglesby, Ill.	Washington Gas Light Co.....Washington, D. C.
McAndrews & Forbes .....Camden, N. J.	Westinghouse Elec. & Mfg. Co...Mansfield, Ohio
M Street Heating Plant .....Washington, D. C.	

ulcan Soot Blower Corporation does not uild down to a price. Vulcan builds into their quipment thirty-three years of experience; uil: by highly skilled engineering and plant ersonnel of long service, using the highest ype material that hard exacting service has emonstrated is the most practical for its urpose. The result is trouble free, long years of service, making unnecessary frequent servicing—and when service is required, skilled field engineers on their rounds, offer it gladly to maintain your Vulcan equipment in top condition. Just ask the Vulcan Sales or Field Engineer WHY Vulcan build into their equipment the most rugged, trouble free, lowest maintenance you can buy.

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★ ★

Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

Barco Perfects A Portable Gasoline-Powered Drill

FOLLOWING exhaustive tests on actual drilling operations conducted on all types of jobs and under a wide variety of working conditions, the Barco Manufacturing Co. of Chicago, Illinois, announces full time production on their newly designed, self-powered, instantly portable driller known as the "Barco J-2."

Barco engineers, as well as other drilling experts, who have seen this unit at work, believe that it marks a great advance over the types of equipment formerly available for similar types of drilling operations required by construction engineers, road contractors, and others.

Barco J-2 Portable Driller At Work

Whereas the former drilling equipment manufactured by the Barco Manufacturing Co. consisted of a drilling swivel applied as an accessory tool to the now famous Barco Hammer, the J-2 is designed as a driller, pure and simple, incorporating the drill-turning mechanism directly in the base of the power unit. Thus it is able to strike a full, direct blow, delivering all its power at the drill head, operating at the minimum of cost.

Its light weight, enabling the operator to carry it to the most inaccessible jobs, and its instant readiness for work under its own power, are further recommendations which the Barco Manufacturing Co. feels justify their present full production schedule.

A ratchet wrench for turning the drill rod is standard equipment with the J-2, and, if the user desires to eliminate hand spooning or flushing of the hole, a small portable air compressor unit, necessary storage tank and fittings are available.

Literature regarding this new driller has been prepared and can be obtained either by writing to the factory and general offices of the Barco Manufacturing Co. at 1801 Winnemac Ave., Chicago, or from any of the company's local dealers.

The illustration shows the new J-2 at work on a quarry job with the drill hole blowing equipment also in use.

Huge Exide-Ironclad Installed in Hammond, Indiana, Plant

THE Chicago District Electric Generating Corporation, which helps to supply Chicago with electricity, recently installed a giant Exide-Ironclad, manufactured by the Electric Storage Battery Co., Philadelphia, Pa., in a 120-ton storage battery locomotive used for hauling coal at their State Line Generating Plant at Hammond, Indiana.

It is the world's largest locomotive battery, consisting of 120 cells type FLAM-31, with a capacity of 2700 ampere-hours at the 6-hour rate and 619 K. W. hrs. This company is also operating one smaller locomotive in the same service, which is also equipped with an Exide-Ironclad battery.

A booklet, entitled "In Selecting any Motive Power Battery," has been issued by the Electric Storage Battery Company and may be secured without charge direct from the manufacturer.

Dodge Announces Prices of New Diesel Truck

ANNOUNCEMENT has just been made by J. D. Burke, director of Dodge Truck Sales, that the new Dodge 3-ton Diesel line will include chassis ranging in wheelbase from 152 inches to 205 inches, and that delivered at Detroit, prices will range from $3230 for the 152 inch wheelbase chassis, to $3450 for the 205 inch wheelbase chassis, with cab fully equipped.

The new Dodge Diesel truck is available in four wheelbase lengths: 152, 170, 180 and 205 inches. Mr. Burke, in announcing the Diesel price range and the four wheelbase lengths, emphasized that the new Dodge product is a

Dodge-built Diesel, engineered and manufactured in the company's own plant.

The new Dodge Diesel truck, available only in the 3-ton range, is an addition to an entirely new line of Dodge trucks which will be manufactured in a giant new factory said to be the industry's most modern and efficient truck plant.

This Dodge Diesel power plant introduced by Dodge Truck Division has been described as a simple, advanced design Diesel in which the marked economies of the full Diesel engine are successfully combined with dependability, easy starting and general performance qualities of the familiar gasoline engine.

New Body for Rural Telephone Maintenance and Installation

THE equipment used in the installation of rural telephones is quite different than the parts carried for urban installation. The body must carry an axe, a stepladder, as well as an extension ladder, and must have platform space available for cross arms or a pole stub if necessary. The 4551 body designed by the American Coach & Body Company has a compartment space for hardware, hand sets and tools, as well as provisions for carrying the bulkier items. The platform width available between the boxes is 46 inches. The body is 75 inches long.

A patented ladder holder holds both ladders securely in transit. It is easily accessible from the rear of the truck.

Plans for Nationwide CP Range Program Completed

PLANS for an extensive nationwide promotion during 1939 in behalf of the CP gas range program have been completed, Alan P. Tappan, chairman of the Association of Gas Appliance and Equipment Manufacturers' domestic gas range committee, has recently announced.

Four major campaigns will project this national promotion during the coming year, Mr. Tappan stated. They will be put into effect as follows: Spring Campaign (April, May, June); Summer Campaign (July, August); Fall Campaign (September, October); and Holiday Campaign (November, December).

It was announced that in the planning of the coming campaigns much attention was given to "the merchants' point of view." During recent months, over 100 questionnaires had been sent out to leading merchandisers of CP gas ranges in all parts of the country asking for suggestions for an effective 1939 program. These suggestions were collated and embodied in the 1939 promotional plans. It is expected that this national program "will comprise one of the most intensive yet devised."

The American Gas Association's national advertising program will feature 20 range ads during the first eight months of 1939. Each of these advertisements will be directed toward acquainting the consumer public with the CP seal and will stress the improved cooking performance of the new CP gas ranges. The national advertising program during the early part of 1939 will reach over 17,000,000 readers.

During the forthcoming CP range promotion, the United States will remain divided in 16 divisions with an equal number of regional managers, under the leadership of Frank M. Houston, chairman of the American Gas Association's Domestic Gas Range Committee. Due to the increase in scope of the national program, additional associate managers are being added to these regional staffs in order to secure greater nationwide dealer and utility coverage. In addition to these new appointments, the Association of Gas Appliance and Equipment Manufacturers is adding to its paid promotional staff additional help at A.G.A.E.M. headquarters to assist in the preparation of localized promotional pieces. The Association is also planning to add new members to its field staff as aids to the regional managers in conducting regional campaigns and meetings.

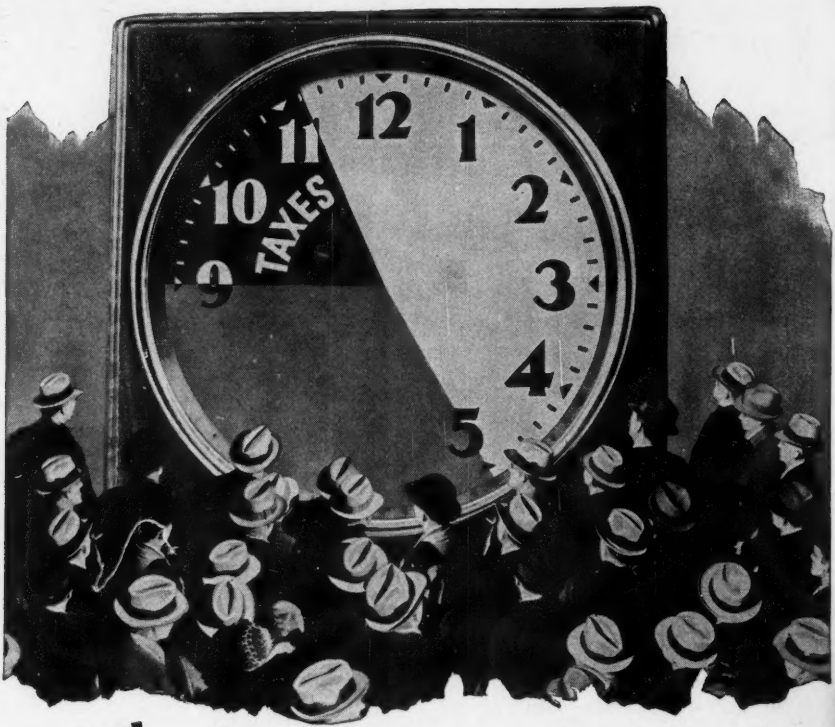
It was announced that much stress will be made in aiding sales outlets in their local promotional endeavors. Many sales promotion items will be supplied them by the A.G.A.E.M. These will include: newspaper mats, window displays, sales-floor demonstrators, direct mailing pieces, hand bills and broadsides, showroom and window banners, bill enclosures, salesmen's visualizers, souvenir banks for customers, and many others.

Material having to do with the Spring Campaign will be mailed to utility companies and dealers on about February 3rd by the A.G.A.E.M. Material for the Summer Campaign will be forthcoming sometime next May.

It has been disclosed that the manufacturers of the CP gas ranges have widely acclaimed the 1939 program, cost of which will be approximately double that of the 1938 promotional program.

New I. H. C. Advertising Heads

A. C. SEYFARTH, formerly assistant advertising manager of the International Harvester Co. has been appointed advertising manager and Carroll E. Johnson has been appointed assistant advertising manager, according to a recent announcement.



TICK! TOCK! $120,000 a Minute

FOR WHAT? FOR GOVERNMENT!

YOU PAY for government through taxes. You pay as a customer and again as a worker, whether in factory, shop, farm or office. If you have something left over you pay again, as through your insurance policy.

Those who work, who produce any income, must carry a heavy burden. As the clock shows, each of us now works over two hours each day for government expenses.

Of this $120,000, the share of all those engaged or employed in retail and wholesale trade is $14,000 for each minute of the working day.

Those employed in factories must work to help pay the $34,000 per minute contributed by the manufacturing industry.

Don't be among those thoughtless ones who glibly say, "I don't pay any taxes." Most taxes are "hidden", many of them deliberately.

When you buy a ten-cent loaf of bread you are contributing to 52 taxes. There are 154 taxes wrapped up in a cake of soap.*

Of course no one resents paying taxes for the necessary functions of government and for relief in emergencies.

But nearly one-third of government spending is for new activities and experiments which have a way of becoming permanent burdens.

Cut government costs to the essentials and the resulting lower taxes will permit private enterprise to move forward as in the past, creating jobs as it goes.

**Write for free pamphlet.*

This message is published by

NATION'S BUSINESS

—a monthly magazine edited in Washington where business and politics meet. Established 1912. 315,000 business men and women subscribe. Begin reading Nation's Business now.

Dig Your Next Trench Job

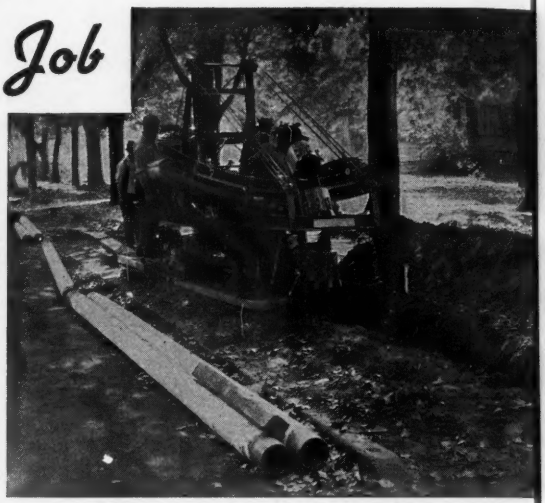
with

"CLEVELANDS"

YOU SAVE MORE

Because

YOU DO MORE

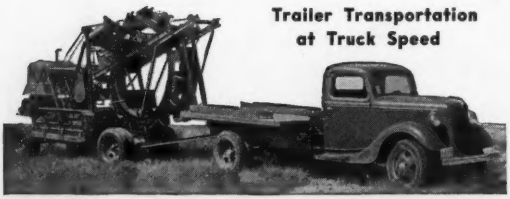


Your next job may be a gruelling main line trench through rough, stony country, in loose sand or sticky gumbo, or it may be a distribution trench in the close confined areas of city or suburbs where you are beset by many obstacles, such as vehicular traffic, curbs, poles, trees, shrubbery, fences, conduits, cables, fine lawns, sidewalks, etc.

No matter where the work or what the conditions, you'll find Clevelands will deliver maximum performance for they are built to meet today's conditions. Available in several models including the now famous Baby Digger.

From their husky Diesel or Gasoline powered engine, to the improved high capacity digging wheel, you'll find toughness, freedom from friction and protection against wear, to an unrivalled degree, in these compact—flexible, mobile Cleveland Trenchers. They are strong and dependable with a notable lack of deadweight and unnecessary bulk.

Let us demonstrate and prove to you on your next job, without obligation, that you'll save more and do more with Clevelands. Write today.



Trailer Transportation at Truck Speed

THE CLEVELAND TRENCHER COMPANY

"Pioneer of the Small Trencher"

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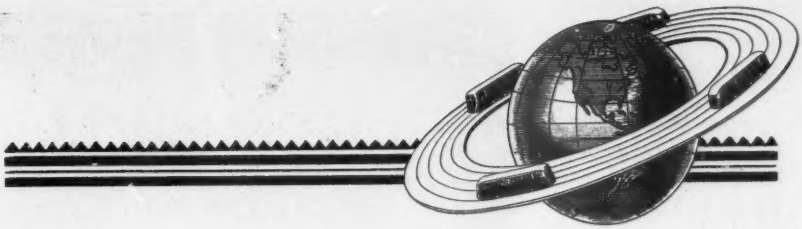
CLEVELAND, OHIO

CLEVELANDS



A Merry Christmas and a prosperous New Year to the transportation industry.

BARRON G. COLLIER, INC.

745 Fifth Ave. **New York City**

Transmission line construction costs can be materially reduced and completion expedited by using Hoosier Crews

HOOSIER ENGINEERING COMPANY

CHICAGO — 46 SO. 5TH ST., COLUMBUS, OHIO — NEW YORK

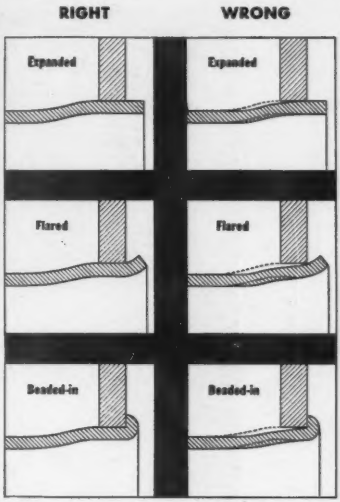
Canadian Hoosier Engineering Company, Ltd.
Montreal

ERECTORS OF TRANSMISSION LINES

Why High Ductility is Vitally Important

(a) Jones & Laughlin Seamless Tubes with their high ductility form a smooth, tight joint and "stay put" permanently...when they are expanded, flared and beaded in. See diagrams below.

(b) Tubes not sufficiently ductile resist forming and tend to pull away from the boiler plate. Such tubes require longer time for working and leaveimperfectjoints. See diagrams below.



J & L manufactures a complete line of seamless and welded steel tubular products. This includes seamless pressure tubes, condenser and heat exchanger tubes.

• • •

Flange steel plates and firebox steel.

re is why you get quick, easy installation, longer life and greater safety with

J & L SEAMLESS STEEL BOILER TUBES

hen boilers get the shut-down habit, Jones & ughlin Seamless Steel Boiler Tubes will help u get them back on the job in a hurry. Jones & ughlin Tubes roll in faster and then stay put. ey keep your boilers working efficiently and eco-mically because every length of Jones & Laughlin iler Tubes has built into it an extra margin of ength, safety and high ductility.

The dependable strength and durability of J & L bes mean that boilers equipped with them stay on e job longer and with fewer costly shut-downs.

The next time you need boiler tubes, call your nes & Laughlin Boiler Tube distributor. You will tubes that are installed at a lower cost . . . which t longer . . . and you will get them just as quickly you need them.

J&L
Seamless Boiler Tubes

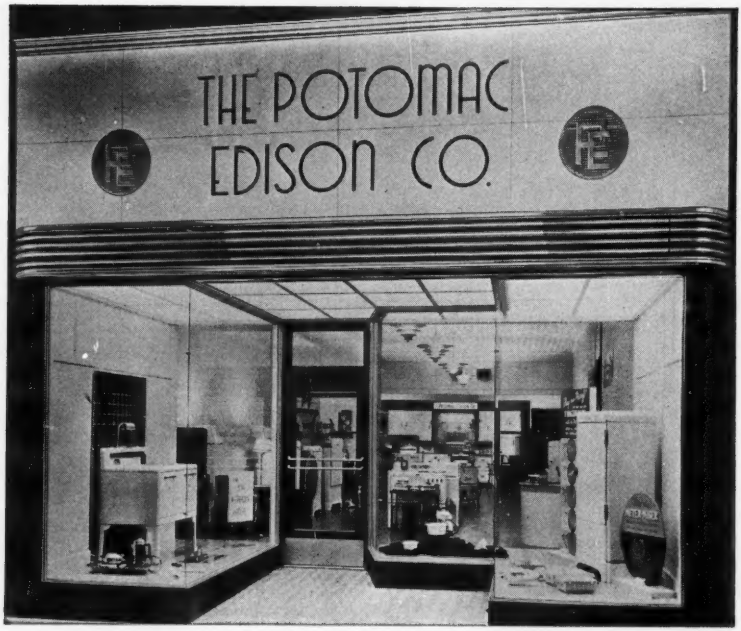
ONES & LAUGHLIN STEEL CORPORATION

AMERICAN IRON AND STEEL WORKS
PITTSBURGH, PENNSYLVANIA

KERS OF HIGH QUALITY IRON AND STEEL PRODUCTS SINCE 1850

J & L—ALWAYS MAKING FINER CARBON STEEL PRODUCTS FOR NEW AND BETTER USES

The sale of Modern Lighting for Modern Store Fronts should *begin at Home!*



Here's how Architect Geo. F. Sansbury and the Potomac Edison Company convince the merchants and property owners of Cumberland, Md., of the value of brightly lighted stores.

A modern store front demands modern illumination. And modern illumination means a heavier lighting load. There's a natural tie-up if there ever was one . . . new Pittco Store Fronts and modern lighting.

But to take best advantage of this tie-up . . . to convince prospects in your community of the soundness of store front modernization with better lighting . . . there's nothing more valuable than an actual example . . . on your own show rooms . . . of just what you mean.

You talk to a merchant . . . tell him the need for modern merchandising methods . . . plug away on the idea of a new store front with better lighting. And to clinch the argument, you say "Look at our own quarters down the street. There's a new front . . . illuminated in the modern manner. We practice what we preach . . . because we know it means better business!"

Put a new Pittco Front on your utility show rooms. Make them an example of what you preach. And when the Pittco Store Front Caravan, sponsored by Pittsburgh Plate Glass Company, comes to your territory, don't miss it. It shows you numerous actual examples of modern store front lighting. It offers you an opportunity to cooperate with a promotional effort that leads directly to more business for you. Contact our local branch for data about the Caravan . . . and for any cooperation on store fronts you may need in your work.

Paint. PITTSBURGH. Glass
PLATE GLASS COMPANY

MAKE INSULATION MEET THE TEST OF A GOOD INVESTMENT

GOOD investments can't be judged by price alone. More important is the security provided by full and continued dividends.

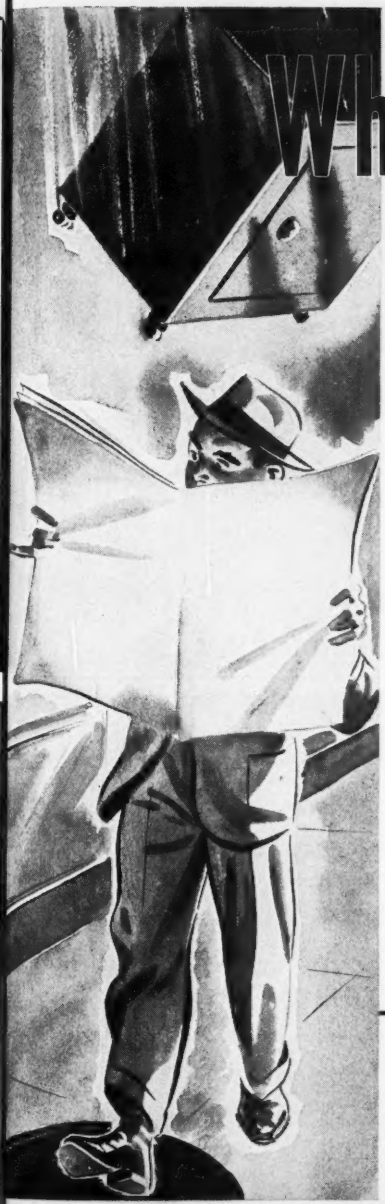
Primarily an investment, insulation must be bought on the same basis . . . must prove its worth in terms of maximum cash returns on fuel savings.

Throughout the country, hundreds of power plants have assured themselves of these insulation dividends. Johns-Manville Engineers, using J-M Insulations, have played an important part in increasing plant efficiency and in reducing operating costs.

Backed by J-M's 75 years of research and field experience on insulation problems, these engineers can help you select the insulation best suited to each individual requirement in your plant. They work with insulations of maximum efficiency and uniformity and are able to recommend the right amount and proper application. For details, address Johns-Manville, 22 E. 40th St., N. Y. C.

JM Johns-Manville INDUSTRIAL INSULATIONS

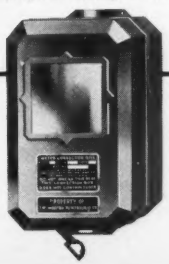
An insulating material for every temperature . . . for every service condition



What you don't know *CAN HURT YOU*

Even today some utilities remain unmoved by the losses caused through current diversion, or dismiss the subject as something of no immediate consequence. However, the before and after experiences of utilities who have controlled the diversion evil through the use of C-B service equipment, conclusively prove that what you don't know *can* hurt you!

A further check-up of your own distribution losses, unimportant as you may suspect them, will reveal the profitable advantages to be gained through the use of C-B equipment. The C-B engineering department will be glad to cooperate with you in such an analysis and assist, without cost or obligation, in the application of C-B service entrance equipment to present or contemplated installations. Ask about Corcoran-Brown custom fabrication facilities.



Bulletins No. 57, 58A, 60, 61, 62 and 63, containing full data on all C-B equipment, are yours for the asking. Send for your copies today.

Electrical Department

CORCORAN-BROWN LAMP DIVISION

THE ELECTRIC AUTO-LITE COMPANY

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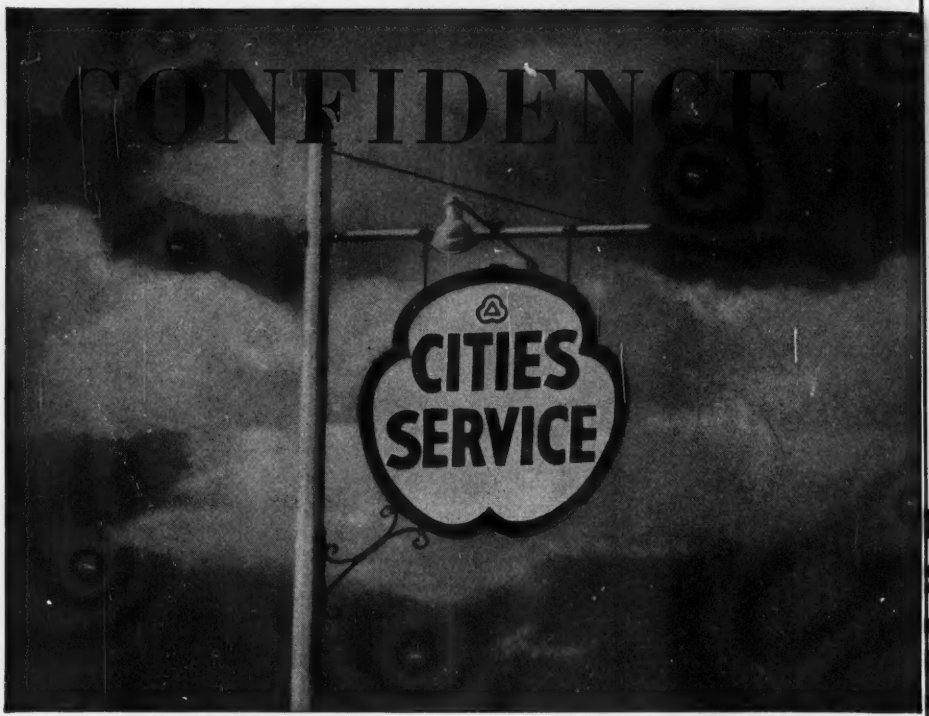

Whether You Buy A Tankful Of Gasolene Or A Carload Of Oil—You Can Be Sure That CITIES SERVICE PRODUCTS *Are Unsurpassed!*

THE QUALITY of Cities Service gasolenes, oils and greases is guarded every step of the way from the oil well to you. For Cities Service is a completely integrated unit in the oil industry, engaged in all phases of petroleum operation... production, transportation and refining. The finished products, backed by 74 years of refining experience, reach you through 15,000 reliable outlets. The Cities Service emblem is your guarantee of dependable products and efficient, courteous service.

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Public Utilities

FORTNIGHTLY

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Including the Issues of July 7, 1938
to December 22, 1938

PUBLIC UTILITIES REPORTS, INC.
WASHINGTON, D. C.

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Index to Public Utilities Reports

(This section of the magazine, which comprises the decisions, orders, and recommendations of courts and commissions, is too voluminous to be included in this index. These reports are published annually in their entirety, in five bound volumes, together with the Annual Digest; copies may be obtained from the publishers, PUBLIC UTILITIES REPORTS, INC., *Munsey Building, Washington, D. C., upon application.)*

Subject Index

RIDGID Pipe Vises

speed work and save you money .. on each job

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Yoke vises have special "No-Mar" jaws in 2" and 2½" capacities that eliminate ugly surface scratches on nickel-plated and polished brass pipe. Post vises are equipped with convenient holders for dope pot and oil can, vise stands have handy tool trays. The frames of RIDGID Vises are ruggedly built of special malleable metal with jaws of tough heat-treated tool steel.

There's a RIDGID Vise to fit every job. Yoke vises in bench, post, kit and stand models; chain vises in bench, post and stand models; capacities up to 8".

For years of dependable, money-saving service buy RIDGID Pipe Vises. Ask your Supply House today.

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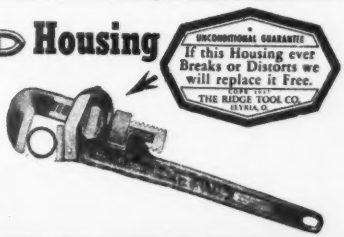

eliminates practically all wrench repair expense. Powerful all-alloy housing, safe chrome molybdenum jaws that won't slip or lock on pipe.

Buy from your Supply House

RIDGID PIPE TOOLS

THE BIRTH OF A NEW SERVICE

ELECTRICITY has found a new job. Because of the favorable response to the adult-size electric blanket last year, General Electric is this year introducing a crib-size blanket. No more piling the crib high and heavy with blankets when it's cold outside. One blanket does the job, and does it automatically.

This new appliance offers an opportunity for increasing off-peak load. Each electric blanket uses as much electricity as a 100-watt lamp burning from bedtime to breakfast. But it has a further significance to you. The electric blanket is a convincing good-will builder. Last year—in its first season—the new blanket sold to 1500 people without the help of advertising or aggressive promotion. It personalized your service as perhaps no other appliance has ever done before. Here are just a few of the many comments which came, unsolicited, from users:

"I do not know of any way in which the expenditure of that amount of money will produce as much comfort."

"I think the electric blanket is one of the best sleeping aids devised to date."

"A snap of the switch saves getting up to add more blankets during the night—or removing the excess one. No more icy sheets to crawl into. Light in weight—yet enough warmth for use on a warm night without the heat turned on—a controlled, even heat when turned on for all night."

This year, with the assistance of national advertising, the electric blanket will bring its personal service into thousands of new homes. And every friend it wins will be more inclined to turn over more domestic jobs to electricity—washing the dishes, tending the furnace, disposing of the garbage. This cumulative load-extension by good appliances is one of the collateral benefits that result from your purchases of General Electric products.

GENERAL ELECTRIC

96-524B